INDEX TO APPENDIX

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-36

STATE OF CALIFORNIA, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, *et al.*,

Appellants,

vs.

ROBERT LARUE, *et al.*,

Appellees.

On Appeal From the United States District Court for the Central District of California.

APPENDIX

Complaint for Declaratory Relief and Injunctive Relief.

United States District Court, Central District of California.

Robert La Rue, dba The Buckit, Vito Tasselli, dba The Golden Garter, Street Combers, Inc., dba The Body Shop, La View Rose, Inc., dba Big Al's, Sailer Inn, Inc., dba The Classic Cat, Robert F. White, dba The Briar Patch, Herbert Newman, dba The Rabbit's Foot, Vinot Enterprises, Inc., dba Hi-Life Theater, Walter C. Robson, dba The Phone Booth, Petan, Inc., dba Jazz A-Go-Go, Ron Walton, dba The Whale House, The Golden Lion, Inc., dba Sir Greg's Fred Chavalier dba The Cherry Pit, Los Angeles Losers, Inc., dba The Losers, Carolina Enterprises, Inc., dba Carolina Lanes, Tommie J. Robins, dba King of Hearts, Maverick Tavern, Inc., dba The Wild Goose, King Henry VIII, Inc., dba King Henry VIII, Angelo E. Gianone and Josephine R. Van Epps, dba Gianone's Steak House, Jeri Dean, Christi Lee, Terri Wang, Judy Mohrmand, Brenda Turner, Madeline Webb, Traci Day, Bonnie Myers, Pat Dupre, Angel Rey Li En Chaing, Pauline Williams, LaSandra Mays, Sami Davis, Martha Vaughn, Jean Chanel, Carole McKelvey, Joni Allen and Louann Wells, Plaintiffs, vs. State of California, and Edward J. Kirby, Director of Alcoholic Beverage Control, Defendants. No. 70-1751-F.

Filed Aug. 10, 1970.

(1) ABC Rules 143.3(1)(a) & (c), 143.4 are Unconstitutional and in Violation of First and Fourteenth Amendments of the United States Constitution.

(2) ABC Rules 143.3(2) are Unconstitutional and in Violation of Equal Protection Clause of the United States Constitution.

(3) ABC Rules 143.3(1)(a) & (c) are Unconstitutional and in Violation of First and Fourteenth Amendments as defined in *Stanley v. Georgia* (1969) 89 S. Ct. 1243.

(4) ABC Rules, and §23089 and §23090.5 of the Business & Professions Codes are Unconstitutional as Creating "Prior Restraint" on Freedom of Speech. *Smith v. Calif.* 361 U. S. 147, 80 S. Ct. 215.

(5) ABC Rules 143.3(1)(a) & (c), 143.4, and 143.2 are Unconstitutional as to Plaintiff Dancers:

(a) No procedure to Challenge Contitutionality; and

(b) Denial of Freedom of Speech and Equal Protection of First and Fourteenth Amendments of the United States Constitution. [1]

PLAINTIFFS allege that:

I

This is an action to redress the deprivation under color of statute, ordinance, regulation, custom and usage of a right, privilege and immunity secured to plaintiffs by the First and Fourteenth Amendments to the United States Constitution. R. S. 1979, 42 U.S.C. 1983, 42 U.S.C.A. 1983.

II

The jurisdiction of this Court is invoked under 28 U.S.C. 1343(3), this being an action as aforestated authorized by law to redress the deprivation under color of statute, ordinance, regulation, custom and usage of a right, privilege and immunity secured to plaintiff by the First and Fourteenth Amendments to the United States Constitution. Jurisdiction is invoked as aforesaid, this being an action authorized by law under the free

speech and press provisions of the United States Constitution, and particularly the right to petition for redress of deprivations, the due process provisions and equal protection provisions of the First and Fourteenth Amendments of the United States Constitution.

III

The value of the rights which plaintiffs in this suit seek to protect and the value of the property and property rights and the extent of the injury herein involved exceeds $10,000.00, exclusive of interest and costs.

IV

This is an action which also arises under the First and Fourteenth Amendments to the United States Constitution and the laws of the United States, viz., U.S.C. 1983.

V

This is also a case where the plaintiffs are seeking a declaration of their rights under the Constitution and laws [2] of the United States, and under Title 28 U.S.C. 2201, 2202; this Court in a case of actual controversy within its jurisdiction may declare the rights of plaintiffs seeking such declaration.

VI

This is also an action which seeks injunctive relief restraining the enforcement, operation and execution of State Statutes by restraining the action of officers of said State in the enforcement and execution of such statutes upon the ground that the State Statutes, on their face, and as construed and applied to plaintiffs, violate the provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution, and therefore, pursuant to Title 28 U.S.C. 2271, 2284,

and the application for such injunctive relief should be heard and determined by a District Court of Three Judges.

VII

At all times herein mentioned some of the plaintiffs were and now are doing business in the City and/or County of Los Angeles, State of California, in the following manner:

(a) ROBERT La RUE, doing business at 10909 South Hawthorne Boulevard, Lennox, California, under the fictitious firm name and style of THE BUCKIT, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(b) VITO TASSELLI, doing business at 1002 North Long Beach Boulevard, Compton, California under the fictitious firm name and style of THE GOLDEN GARTER, having complied with all of the provisions of 2466-68 of the Civil Code of the State of California. [3]

(c) STREET COMBERS, INC., doing business at 8250 Sunset Boulevard, Los Angeles, California, is a corporation organized and existing under and pursuant to the laws of the State of California, and is doing business under the fictitious firm name and style of THE BODY SHOP, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(d) La VIEN ROSE, INC., doing business at 8917 Sunset Boulevard, Los Angeles, California, is a corporation organized and existing under and pursuant to the laws of the State of California,

and is doing business under the fictitious firm name and style of BIG AL'S, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(e) SAILER INN, INC., doing business at 8844 Sunset Boulevard, Los Angeles, California, is a corporation organized and existing under and pursuant to the laws of the State of California, and is doing business under the fictitious firm name and style of THE CLASSIC CAT, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(f) ROBERT F. WHITE, doing business at 4374 East Live Oak Avenue, Arcadia, California, under the fictitious firm name and style of THE BRIAR PATCH, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(g) HERBERT NEWMAN, doing business at 5623 Hollywood Boulevard, Los Angeles, California, under the fictitious firm name and style of THE RABBIT'S FOOT, having complied with all of the provisions of [4] §2466-68 of the Civil Code of the State of California;

(h) VINOT ENTERPRISES, INC., doing business at 1758 E. Colorado Blvd., Pasadena, California, is a corporation organized and existing under and pursuant to the laws of the State of California, and is doing business under the fictitious firm name and style of HI-LIFE THEATER, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(i) WALTER C. ROBSON, doing business at 8505 Santa Monica Boulevard, Los Angeles, California, under the fictitious firm name and style of THE PHONE BOOTH, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(j) WALTER C. ROBSON, doing business at 9018 Sunset Boulevard, Los Angeles, California, under the fictitious firm name and style of THE PHONE BOOTH, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(k) PETAN, INC., doing business at 1952 West Adams Boulevard, Los Angeles, California, is a corporation organized and existing under and pursuant to the laws of the State of California, and is doing business under the fictitious firm name and style of JAZZ-A-GO-GO, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(l) RON WALTON, doing business at 115 West Sepulveda Boulevard, Carson, California, under the fictitious firm name and style of THE [5] WHALE HOUSE, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(m) THE GOLDEN LION, INC., doing business at 1612 Pacific Coast Highway, Harbor City, California, is a corporation organized and existing under and pursuant to the laws of the State of California, and is doing business under the fictitious firm name and style of SIR GREGS, having complied with all of the provisions of §2366-68 of the Civil Code of the State of California;

(n) FRED CHEVALIER, doing business at 117 S. Rosemead, Pasadena, under the fictitious firm name and style of THE CHERRY PIT, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(o) LOS ANGELES LOSERS, INC., doing business at 818 N. La Cienega Boulevard, Los Angeles, California, is a corporation organized and existing under and pursuant to the laws of the State of California, and is doing business under the fictitious firm name and style of THE LOSERS, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(p) CAROLINA ENTERPRISES, INC., doing business at 5601 Century Boulevard, Los Angeles, California, is a corporation organized and existing under and pursuant to the laws of the State of California, and is doing business under the fictitious firm name and style of CAROLINA LANES, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California; [6]

(q) TOMMIE J. ROBINS, doing business at 11816 Aviation Boulevard, Inglewood, California, under the fictitious firm name and style of KING OF HEARTS, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(r) MAVERICK TAVERN, INC., doing business at 11604 Aviation Boulevard, Inglewood, California, is a corporation organized and existing under and pursuant to the laws of the State of

California, is doing business under the fictitious firm name and style of THE WILD GOOSE, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California;

(s) KING HENRY VIII, INC., doing business at 13443 Crenshaw Boulevard, Hawthorne, California, is a corporation organized and existing under and pursuant to the laws of the State of California, is doing business under the fictitious firm name and style of KING HENRY VIII, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California.

(t) ANGELO E. GIANONE and JOSEPHINE R. VAN EPPS, doing business at 1453 N. Lake Ave., Pasadena, California, under the fictitious firm name and style of GIANONE'S STEAK HOUSE, having complied with all of the provisions of §2466-68 of the Civil Code of the State of California.

VIII

That all of the plaintiffs, night club owners, whether individual, partnership, corporation or otherwise, have a common interest in the subject matter of this action, and further, each has a right to relief in respect [7] to or arising out of the transaction complained of herein, that is to say, the challenged constitutionality of the Administrative Alcoholic Beverage Control Rules. If all of said persons herein brought separate actions the same questions of law and fact would arise in each, and said questions are common to all parties.

IX

At all times herein mentioned, plaintiffs (described in Paragraph VII hereof,) and each of them, were and now are the operators of night clubs and/or cocktail lounges, at the addresses designated in this complaint. That each of said plaintiffs have been and do offer to such persons attending their premises, as and for entertainment, that which is known as interpretive jazz dancing. That said dancing is commonly known as "topless", "bottomless" and/or "bare buttocks" or further, sometimes referred to as "nude dancing". That said dancers have danced completely "nude", i.e., exposure of the body in an artistic expression manner.

X

At all times herein mentioned, defendant THE STATE OF CALIFORNIA was, and now is a governmental entity, subject to suit and court process pursuant to the applicable provisions of the California Government Code.

XI

Plaintiffs are informed and believe, and upon such information and belief, allege that at all times herein mentioned, defendant EDWARD J. KIRBY was, and now is, Director of the DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL.

XII

At all time herein mentioned the ALCOHOLIC BEVERAGE CONTROL was and is now an agency of the State of California, [8] created by and authorized in the Constitution of the State of California. That the Rules referred to herein are statewide and have the same effect of law.

XIII

At all times herein mentioned plaintiffs, (described in Paragraph VII hereof, and each of them, held and still hold on-sale Alcoholic Beverage Licenses and/or beer licenses issued by the DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL of the State of California, and further, at all times herein mentioned, said licenses were and still are valid and in full force and effect.

XIV

That the various establishments belonging to the plaintiffs, (described in Paragraph VII hereof), as hereinabove alleged, are open to the public. Minors are not permitted inside the premises. Individuals employed by plaintiffs check patrons' identification to assure non-entrance of minors. The entertainment herein referred to cannot be viewed from outside of the premises, and plaintiffs have posted at their entrances a sign which states: "If you would be offended by nude entertainment do not come in". There is a further sign inside the entrance which states: "Warning This establishment offers nude entertainment. If you would be offended do not enter." Plaintiffs' signs and advertisements convey only the normal description of the entertainment, i.e., "nude dancing", and the like, and nothing more.

XV

Of or about July 10, 1970, the DEPARTMENT OF ALCOHOLIC CONTROL ADOPTED Rules 143.2, 143.3, 143.4 and 143.5, copies of which are attached hereto as Exhibits "A", "B", "C" and "D", respectively. Said Rules are to become effective [9] on August 10, 1970. That upon becoming effective, a violation of said Rules constitute a basis for the suspension or

revocation of licenses as provided by Section 24,200 (b) of the Business & Professions Code of the State of California.

XVI

The plaintiffs, who are described in Paragraph VII hereof, as heretofore alleged, are the club owners and operators in the various night clubs and cocktail lounges of the City and/or County of Los Angeles. Said establishments are open to the public, and generally offer for sale food and/or beverages, both alcoholic and non-alcoholic. That in addition thereto, each of said establishments offers, as entertainment to its patrons, those certain form of female dances commonly known as "topless", "bottomless", and "bare buttocks". These dances are performed by dancers exposing their "bare breasts" and all other portions of their bodies to the view of the patrons. That among the various types, names and styles of dances carried on are: "Interpretive Jazz", the "Frug", the "Swim", the "Popcorn", "Walking the Dog", the "Watusi", the "Monkey", and the "Twist". Said dances consist of body movement in rhythm with popular music, completely nude. That said dances are considered to be an artistic type of dance, and they are not obscene.

XVII

Defendant EDWARD J. KIRBY, Director of the ALCOHOLIC BEVERAGE CONTROL, his agents and servants acting in concert with him, intend to and will suspend and/or revoke the onsale alcoholic beverage licenses of plaintiffs herein on the ground that the entertainment heretofore referred to in this complaint, which is being offered by said plaintiffs, under the conditions herein stated, is in violation of or [10] violates the rules promulgated by said Department which are

attached hereto as Exhibits "A", "B", "C" and "D". Plaintiffs are informed and believe, and upon such information and belief allege that the agents, servants and employees of said EDWARD J. KIRBY will institute proceedings for the supension or revocation of plaintiffs' licenses should plaintiffs conduct or cause to be conducted the "bottomless dancing" which has, in the past, been conducted upon their licensed premises. That plaintiffs are further informed and believe, and upon such information and belief allege that so long as the dances are "nude", regardless of whether they are obscene, that such proceedings will be instituted and that their licenses will be suspended or revoked.

XVIII

Rules 143.3(1) (a) & (c) and 143.4 (1), (2), (3) and (4) are void and unconstitutional as applied herein and on their face in that they

(a) prohibit nudity without regard to whether it is or is not obscene; and

(b) prohibit acts which simulate sexual intercourse, etc., with regard to whether they are or are not obscene, or are a part of a theater performance, or not;

all in violation of the First and Fourteenth Amendments of the Constitution of the United States.

XIX

That the various on-sale alcoholic beverage licenses owned by each of the plaintiffs (described in Paragraph VII hereof, constitutes an extremely valuable property right, and without which said plaintiffs will be deprived of their business. [11]

XX

The First Amendment to the Constitution of the United States proposed to the Legislatures of the several states by the First Congress, on September 25, 1789, and subsequently ratified and adopted as an Amendment to the Constitution of the United States, reads as follows:

> "Congress shall make no law . . . abridging the freedom of speech or of the press . . ."

The rights guaranteed citizens of the United States by virtue of the First Amendment to the Constitution, have been extended to the Citizens of the several states by virtue of the Fourteenth Amendment to said Constitution as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

That said rights guaranteed by the First and Fourteenth Amendments of the Constitution of the United States have been incorporated in applicable sections of the Constitution of the State of California.

XXI

The Supreme Court of the United States has held that the constitutional right of freedom of speech includes freedom of expression. Freedom of expression in-

cludes the arts, literature and entertainment such as dancing. The [12] types of dances concerned herein are included within said Constitutional guarantee.

XXII

Said Rules, attached hereto as Exhibits "A", "B", "C" and "D" are unconstitutional and in violation of the First and Fourteenth Amendment of the Constitution of the United States in that they, and each of them, deny to plaintiffs herein their rights to freedom of speech and expression. In particular, they are unconstitutional in the manner in which they are being applied in that said State action makes mere exposure of the body or nudity, when taking place on a licensed premises, the basis of a forfeiture of the on—sale alcoholic beverage license. Said Rules as being applied herein, and on their face, form the basis of a forfeiture of personal property without due process of law. The First and Fourteenth Amendments of the Constitution of the United States, as interpreted by the Supreme Court of the United States, prohibit a State, or any state action from prohibiting activity involving freedom of expression, which is not obscene. The Constitution of the United States, as interpreted by the Supreme Court of the United States, dictates that mere nudity or exposure is not obscenity.

XXIII

An actual controversy has arisen and now exists between plaintiffs and defendants, and each of them, relative to their respective rights, duties and obligations in that plaintiffs contend that said State Statutes and State Constitution are unconstitutional and unenforceable both on their face and as construed by plaintiffs.

XXIV

Plaintiffs, and each of them, desire a declaration of their rights with respect to the application of ALCOHOLIC BEVERAGE CONTROL Rules, Exhibits "A", "B", "C" [13] and "D", with particular reference to their constitutionality in connection with the First and Fourteenth Amendments to the Constitution of the United States of America. Such a declaration is necessary to avoid a forfeiture of each plaintiff's property rights.

XXV

Plaintiffs (described in Paragraph VII hereof) have been threatened with and are in danger of immediate irreparable injury in the form of suspension or revocation, and do intend to proceed.

XXVI

Plaintiffs, and each of them have no adequate remedy at law for the threatened impending and immediate harm and injury in that there is no civil remedy available to plaintiffs, and each of them, other than the one presently before this Court. The damages which plaintiffs, and each of them will suffer from the suspension or revocation of their liquor licenses is immeasurable and impossible to determine.

SECOND CAUSE OF ACTION

XXVII

All plaintiffs incorporate and reiterate each and all of the allegations contained in Paragraphs I through XXVI both inclusive, of their first cause of action, and make the same as part hereof as though set forth herein in full.

XXVIII

Said Fourteenth Amendment of the United States Constitution guarantees all citizens similarly situated equal protection of the laws. That Rule 143.3(2) which requires "Entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage . . . removed at least six feet from the nearest patron", deprives plaintiffs, [14] and each of them, from the following rights, privileges and immunities secured all plaintiffs by the United States Constitution, among others:

(a) The right to be free from abridgements of freedom of speech and press guaranteed by the provisions of the First and Fourteenth Amendments to the United States Constitution;

(b) The right to be free from previous restraint and restriction of dancing and freedom of expression which is not obscene, nor otherwise unlawful, and entitled to the protective guarantees of the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution;

(c) The right to be free from arbitrary and capricious censorship of a lawful dance entitled to the protections of the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution;

(d) The right to pursue a chosen business and occupation without arbitrary, capricious and discriminatory interference by officials of government under the "due process" provisions of the Fourteenth Amendment to the United States Constitution.

XXIX

That said Fourteenth Amendment of the United States Constitution further guarantees all citizens "due process" of the law. That as interpreted by the Supreme Court of the United States, "due process" requires that plaintiffs, and each of them, herein, be sufficiently put on notice of the prohibited conduct so that a reasonable and prudent person can, should he desire, avoid that type of conduct [15] which will render him liable for the penalties. That Rule 143.3 is so vauge that a man of common intelligence must necessarily guess at its meaning and differing as to its application. That Rule 143.3(1)(a) prohibiting a licensee from permitting any person to perform acts which simulate sexual intercourse is so vague and over broad as to deny "due process" of law.

THIRD CAUSE OF ACTION

XXX

Plaintiffs, club owners, reallege and incorporate herein each and all of the allegations contained in Paragraphs I through XXVI of the first cause of action, and make the same a part hereof by reference as though fully set forth herein.

XXXI

There is a bona fide dispute between the plaintiff club owners as to whether Alcoholic Beverage Control Rules 143.3(1) (a) & (c) and 143.4 and 143.3(2) on their face and as construed and applied by defendants, are unconstitutional, null and void, in violation

of the free speech and press, "due process", equal protection of the First, Fourth and Fourteenth Amendments to the United States Constitution.

Plaintiff alleges, and defendants deny that Alcoholic Beverage Control Rules 143.3(1) (a) & (c), 143.4 and 143.3(2), on their face and as construed and applied are unconstitutional, null and void, in the following respects:

(a) The above quoted sections of the Alcoholic Beverage Control Rules purport to authorize the forfeiture of plaintiffs (described in Paragraph VII hereof), property for conducting or causing to be conducted nude dances on their premises as herein alleged without an adversary proceeding [16]

(b) The above quoted sections of the Alcoholic Beverage Control Rules purport to make it contrary to public welfare and morals and a basis of forfeiture of property to exhibit nude dancing to adults, even though no member of the public's privacy nor sensitivity is thereby offended in violation of the rule announced by the United States Supreme Court in *STANLEY V. GEORGIA*, 394 U. S. 557; see also, *STEIN V. BATCHELOR*. 300 Fed. Supp. 602 (D. C. Tex. 1969); *KAR-ALEXIS, et al V. BYRNE, etc.*, United States District Court for the District of Massachusetts, Civil Action No. 69-655-J, unreported;

(c) The above quoted Alcoholic Beverage Control Rules purport to give to the defendants the discretion to suppress the dancing referred to herein, based upon their own subjective, arbitrary determination that same is obscene, when in fact

it has been held by the Supreme Court of the United States that nudity is not obscene.

SUNSHINE BOOK CO. V. SUMMERFIELD, (1958) 355 U. S. 372;

EXCELLENT PUBLISHERS, INC. V. UNITED STATES, (1962) 309 Fed. Rep. (2d) 362.

(d) The above quoted sections of the Alcoholic Beverage Control Rules purport to authorize repetitive and multiple disciplinary proceedings notwithstanding the fact that the said dances have been held to be constitutionally protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution.

XXXII

Said Alcoholic Beverage Control Rules, plaintiffs' [17] Exhibits "A", "B", "C" and "D" hereof, are being applied by the defendants herein in an unconstatutional manner so as to violate the free speech and press rights of the plaintiffs as herein alleged, the rights guaranteed citizens of the United States in accordance with the First and Fourteenth Amendments of the United States Constitution. That dancing is a form of expression, protected by the First Amendment, unless obscene, that a mere nudity in a constitutionally protected dance does not remove said dance from the constitutional protection, and that said dance, must, in addition to being nude, be obscene. Defendants, and each of them, have conspired to eliminate "nude" dancing from the establishments of plaintiffs and others in the City of Los Angeles and County of Los Angeles, without regard to obscenity. That they will either

through multiple disciplinary proceedings force persons similarly situated to plaintiffs herein, into bankruptcy, discourage employees from this type of dancing so that they refuse to continue, harass plaintiffs herein through threats from exhibiting the type of dancing alleged herein, and have openly stated it is the policy of the Alcoholic Beverage Control to revoke a liquor license if someone appears on the stage nude.

FOURTH CAUSE OF ACTION

XXXIII

Plaintiffs, club owners, reallege and incorporate herein each and all of the allegations contained in Paragraphs I through XXVI of the first cause of action, and make the same a part hereof by reference as though fully set forth herein.

XXXIV

In 1967, the Legislature of the State of California, enacted Section 23089 of the Business & Professions [18] Code which reads as follows:

> "REVIEW OF FINAL ORDERS; TIME AND MANNER
>
> "Final orders of the board may be reviewed by the courts specified in Article 5 (commencing with Section 23090) of this chapter within the time and in the manner therein specified and not otherwise."
>
> (Added Stats. 1967, c. 1525, p. 3634, §1)

In 1967 the Legislature of the State of California, enacted Section 23090.5 of the Business & Professions Code which reads as follows:

> "'INJUNCTION; MANDAMUS

"No court of this state, except the Supreme Court and the courts of appeal to the extent specified in this article, shall have jurisdiction to review, affirm, reverse, correct, or annul any order, rule, or decision of the department or to suspend, stay, or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the department in the performance of its duties, but a writ of mandate shall lie from the Supreme Court or the courts of appeal in any proper case."

(Added Stats. 1967, c. 1525, p. 3635, §4.)

XXXV

That the combined effect of the Alcoholic Beverage Control Rules 143.3 (1) (a) & (c); 143.3(2) and 143.4, when taken with Business & Professions Code Sections 23089 and 23090.5, are void and unconstitutional within the First and Fourteenth Amendments of the United States Constitution in that they deny plaintiffs (described in Paragraph VII hereof) "due process" of law in that they create a "prior restraint" in the exercise of the First Amendment of the United States Constitution right of freedom of speech and create a "chilling" effect thereon condemned in *SMITH V. CALIFORNIA*, 361 U.S. [19] 147; 80 S. Ct. 215; that plaintiffs are denied "due process" in that they cannot by any procedure challenge the constitutionality without first risking the loss of license. Such risk creates an unconstitutional "prior restraint" of the proper exercise of their constitutional rights to freedom of speech.

FIFTH CAUSE OF ACTION

XXXVI

Plaintiffs, and each of them, reallege and incorporate herein, each and all of the allegations contained in Paragraphs I through XXVI of the first cause of action, and Paragraphs XXXI and XXXII of the third cause of action, and make the same a part hereof by reference as though fully set forth herein.

XXXVII

That petitioners JERI DEAN, CHRISTIE LEE, TERI WANG, JUDY MOHRMAND, BRANDA TURNER, MADELINE WEBB, TRACI DAY, BONNIE MYERS, PAT DUPRE, ANGEL REY, LI EN CHAING, PAULINE WILLIAMS, LaSANDRA MAYS, SAMI DAVIS, MARTHA VAUGHN, JEAN CHANEL, JONI ALLEN, CAROLE McKELVEY and LOUANN WELLS are professional dancers, and each and every one of them is employed by the various plaintiffs more particularly described in Paragraph VII hereof.

XXXVIII

That all of the plaintiffs, dancers, have a common interest in the subject matter of this action, and further, each has a right to relief in respect to or arising out of the transaction complained of herein, that is to say, the challenged constitutionality of the Administrative Alcoholic Beverage Control Rules. If all of said persons herein brought separate actions, the same questions of law and fact would arise in each, and said questions are common to all parties. [20]

XXXIX

All of said dancers, plaintiffs herein, earn a livelihood as "nude" dancers on the premises of plaintiffs,

club owners, and dance in a manner particularly described in Paragraphs IX and XVI and will be deprived of their livelihood should the Rules herein become effective on or after August 10, 1970.

XL

Said Rules, on their face, and as applied to plaintiffs, dancers herein, violate their constitutional rights under the First and Fourteenth Amendment of the United States Constitution, and denies them freedom of speech and expression.

XLI

That in addition thereto, the said plaintiffs referred to in this cause of action, are denied "equal protection" of the laws within the meaning of the First and Fourteenth Amendments to the United States Constitution, in that other dancers similarly situated may dance nude in theaters and/or any establishments in the State of California where alcoholic beverages are not sold.

XLII

In addition thereto, said dancers, being unlicensed persons, will be denied "due process" of law in that the Business & Professions Code §23089 and §23090.5 and the Alcoholic Beverage Control Rules being challenged herein, when taken together, deny them any access to the Courts of the State of California, or any relief whatsoever. That said sections, divesting the Superior Court of jurisdiction, if so interpreted, when construed with the applicable Business & Professions Code Sections, requiring exhausting of administrative remedies, leave said plaintiffs, who have a legal right and standing to sue, without any remedy for the reason that [21] they are unlicensed persons within the meaning of the Business & Professions Code. As such, they are deprived of "due process" of law. The Superior

Court has refused to hear petitioning dancers on the ground that it has no jurisdiction. The District Court of Appeal has summarily denied, without a hearing, a Petition for Writ of Mandate which embodied essentially the causes of actions filed herein. This was denied at 2:30 p.m. on Tuesday, August 4, 1970. The Supreme Court of California denied a Stay Order at 4 p.m. on Thursday, August 6, 1970, and will not decide wether they will even hear the case, or cause a hearing to be had until sometime in September, which hearing will be set, in all probability thereafter, if granted.

WHEREFORE, petitioners pray judgment against the defendants, and each of them, as follows:

1. For a temporary restraining order, a preliminary injunction and a final injunction, restraining and enjoining defendants, and each of them, their agents, servants, representatives and employees, and all persons in active concert or participating with them, from

(a) Enforcing Rule 143.3 of the Department of Alcoholic Beverage Control, from and after August 10, 1970;

(b) Enforcing Rule 143.4 of the Department of Alcoholic Beverage Control, from and after August 10, 1970.

2. For money damages as proven;

3. For such other and further relief as to the Court may seem just and proper in the premises.

LAW OFFICES OF HARRISON W. HERTZBERG

By /s/ Harrison W. Hertzberg
HARRISON W. HERTZBERG
Attorneys for Plaintiffs. [22]

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

ADOPTION OF RULE 143.2

143.2 *Attire and Conduct.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:

(1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises which such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the aerola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.

(2) To employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.

(3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

(4) To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

Distr. A, D-2, F-1, F-2, G-1, G-2, I

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

ADOPTION OF RULE 143.3

143.3 *Entertainers and Conduct.* Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

Live entertainment is permitted on any licensed premises, except that:

(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

Distr. A, D-2, F-1, F-2, G-1, G-2, I

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

ADOPTION OF RULE 143.4

143.4. *Visual Displays.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

(3) Scenes wherein a person displays the vulva or the anus or the genitals.

(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

ADOPTION OF RULE 143.5

143.5 *Ordinances.* Notwithstanding any of the provisions of Rules 143.2, 143.3 and 143.4, no on-sale licensee shall employ, use the services of, or permit upon his licensed premises, any entertainment or person so attired as to be in violation of any city or county ordinance.

Effective August 10, 1970

Distr. A, D-2, F-1, F-2, G-1, G-2, I

Stipulation and Order and Amendment to Complaint.

United States District Court, Central District of California.

Robert LaRue, et al., Plaintiffs, vs. State of California, et al., Defendants. No. 70-1751-F.

Filed Oct. 29, 1970.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that the complaint herein be, and the same may be amended in accordance with the Amendment to Complaint attached hereto.

Dated: September 11, 1970.

LAW OFFICES OF HARRISON W. HERTZBERG

By /s/ Harrison W. Hertzberg
Attorneys for Plaintiffs.

THOMAS C. LYNCH, Attorney General

By /s/ L. Stephen Porter
Attorneys for Defendants.

ORDER

UPON READING AND FILING the within Stipulation, and good cause appearing therefor, it is SO ORDERED.

Dated: Oct. 29, 1970.

/s/ ILLEGIBLE
JUDGE [1]

Amendment to Complaint.

United States District Court, Central District of California.

Robert La Rue, etc., et al., Plaintiffs, vs. State of California, et al., Defendants. No. 70-1751-F.

The prayer of said complaint is amended to contain the additional prayer for relief, which reads as follows:

"4. That the Court declare the respective rights and liabilities of the parties hereto under the Constitution and laws of the United States".

Other than the aforementioned amendment, plaintiffs reaffirm all of the allegations contained in said complaint.

LAW OFFICES OF HARRISON W. HERTZBERG

/s/ By Harrison W. Hertzberg
Attorneys for Plaintiffs. [2]

State of California, County of Los Angeles—ss.

HOWARD WHITE being first duly sworn, deposes and says: I am the Secretary of CAROLINA ENTERPRISES INC., one of the plaintiffs in the above entitled action; I have read the foregoing AMENDMENT TO COMPLAINT and know the contents thereof, and I certify that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

/s/ Howard White
HOWARD WHITE

Subscribed and sworn to before me this 10th day of September, 1970. /s/ Gussie D. Abramson, GUSSIE D. ABRAMSON, Notary Public in and for said County and State.

[Seal] [3]

Complaint for Injunction Against Violation of Civil Rights.

The United States District Court for the Central District of California.

Jerry D. Jennings, dba Sugar Shack, Erwin A. Rohm, dba Chee Chee, Raymond Rohm, dba Firehouse, Richard Carson and Robert A. Warner, dba Tuscan Room, Seemaygro, Inc., a California Corporation, dba Sarong Gals, Robert E. Poff, dba 1st King, Edward Grimes, dba The Circle, Harry J. Coleman, dba Hi Dollie and Everett L. Butts, dba The Worlock, Plaintiffs, vs. Edward J. Kirby, Director of the Department of Alcoholic Beverage Control of the State of California, John J. Canney, Assistant Director of the Department of Alcoholic Beverage Control of the State of California, John A. Kelly, Orange County District Administrator of the Department of Alcoholic Beverage Control of the State of California, James F. Meehan, Long Beach District Administrator of the Department of Alcoholic Beverage Control of the State of California, Kermit Q. Greene, Crenshaw District Administrator of the Department of Alcoholic Beverage Control of the State of California, Defendants. Civil Action No. 70-1782-HP.

Filed: Aug. 12, 1970.

Plaintiffs allege:

1. This action is brought under the Civil Rights Act, 42 USCA Sec. 1983, and 28 USCA Sec. 1343. Defendants have been and are acting under color of Rules number 143.2, 143.3, 143.4, and 143.5 of the Department of Alcoholic Beverage Control of the [1] State of California to deprive Plaintiffs and Plaintiffs' customers of their rights to free speech under the First

Amendment to the Constitution of the United States as will more fully appear hereinafter.

2. At all times mentioned herein Plaintiff JERRY D. JENNINGS, dba SUGAR SHACK, has been and now is the owner and operator of premises located in the County of Orange, State of California, and licensed by the Department of Alcoholic Beverage Control of the State of California for the sale of alcoholic beverages for consumption on the premises. Said premises are located in the Orange County District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, Plaintiff has been and now is offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed.

3. At all times mentioned herein Plaintiff ERWIN A. ROHM dba CHEE CHEE, has been and now is the owner and operator of premises located in the County of Orange, State of California, and licensed by the Department of Alcoholic Beverage Control of the State of California for the sale of alcoholic beverages for consumption on the premises. Said premises are located in the Orange County District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, Plaintiff has been and now is offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed.

4. At all times mentioned herein Plaintiff RAYMOND ROHM, dba FIREHOUSE, has been and now is the owner and operator of premises located in the County of Orange, State of California, and licensed by the Department of Alcoholic Beverage Control of the

for consumption on the premises. Said premises are located in [2] the Orange County District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, Plaintiff has been and now is offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed.

5. At all times mentioned herein Plaintiffs RICHARD CARSON and ROBERT A. WARNER, dba TUSCAN ROOM, have been and now are the owners and operators of premises located in the County of Orange, State of California, and licensed by the Department of Alcoholic Beverage Control of the State of California for the sale of alcoholic beverages for consumption on the premises. Said premises are located in the Orange County District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, plaintiffs have been and now are offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed.

6. At all times mentioned herein Plaintiff SEEMAYGRO, INC. was and is a California Corporation duly authorized and existing under the laws of the State of California, and doing business as SARONG GALS. Said Plaintiff has been and now is the owner and operator of premises located in the County of Orange, State of California, and licensed by the Department of Alcoholic Beverage Control of the State of California for the sale of alcoholic beverages for consumption on the premises. Said premises are located in the Orange County District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, plaintiff has been and

now is offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed.

7. At all times mentioned herein Plaintiff ROBERT E. POFF, [3] dba 1st KING, has been and now is the owner and operator of premises located in the County of Los Angeles, State of California and licensed by the Department of Alcoholic Beverage Control of the State of California for the sale of alcoholic beverages for consumption on the premises. Said premises are located in the Long Beach District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, Plaintiff has been and now is offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed.

8. At all times mentioned herein Plaintiff EDWARD GRIMES, dba THE CIRCLE, has been and now is the owner and operator of premises located in the County of Los Angeles, State of California and licensed by the Department of Alcoholic Beverage Control of the State of California for the sale of alcoholic beverages for consumption on the premises. Said premises are located in the Crenshaw District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, Plaintiff has been and now is offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed.

9. At all times mentioned herein Plaintiff HARRY J. COLEMAN, dba HI DOLLIE, has been and now is the owner and operator of premises located in the County of Los Angeles, State of California and li-

censed by the Department of Alcoholic Beverage Control of the State of California for the sale of alcoholic beverages for consumption on the premises. Said premises are located in the Crenshaw District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, Plaintiff has been and now is offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed. [4]

10. At all times mentioned herein Plaintiff EVERETT L. BUTTS, dba THE WORLOCK, has been and now is the owner and operator of premises located in the County of Los Angeles, State of California and licensed by the Department of Alcoholic Beverage Control of the State of California for the sale of alcoholic beverages for consumption on the premises. Said premises are located in the Long Beach District of the Department of Alcoholic Beverage Control of the State of California. At all times mentioned herein, Plaintiff has been and now is offering entertainment at said premises by nude entertainers performing while nude or with their breasts or buttocks exposed.

11. At all times mentioned herein, Defendant EDWARD J. KIRBY has been and now is the duly appointed Director of the Department of Alcoholic Beverage Control of the State of California.

12. At all times mentioned herein, Defendant JAMES J. CANNY has been and now is Deputy Director of the Department of Alcoholic Beverage Control of the State of California and has overall responsibility for enforcement of the Department's Rules in Southern California, including Los Angeles and Orange Counties.

13. At all times mentioned herein, Defendant JAMES J. MEEHAN has been and now is Administrator of the Long Beach District of the Department of Alcoholic Beverage Control, and has the responsibility for the enforcement of the Department's Rules therein.

14. At all times mentioned herein, Defendant KERMIT Q. GREENE has been and now is Administrator of the Crenshaw District of the Department of Alcoholic Beverage Control, and has the responsibility for the enforcement of the Department's Rules therein.

15. At all times mentioned herein, Defendant JOHN A. KELLY has been and now is Administrator of the Orange County District [5] of the Department of Alcoholic Beverage Control, and has the responsibility for the enforcement of the Department's Rules therein.

16. On or about July 9, 1970, Defendant EDWARD J. KIRBY, acting in his official capacity, caused the Department of Alcoholic Beverage Control of the State of California to adopt and promulgate a set of four rules, designated as Rule 143.2, "Attire and Conduct"; Rule 143.3, "Entertainers and Conduct"; Rule 143.4 "Visual Displays"; and Rule 143.5, "Ordinances." Said rules became effective on or about August 10, 1970. A true and correct copy of said rules is attached hereto as Exhibit "A" and incorporated herein by reference.

17. Said Rules deprive Plaintiffs of their right to free speech under the First Amendment to the Constitution of the United States because they prohibit any Plaintiff from presenting any form of live entertainment or showing any pictures in which persons are not dressed in the manner required by said Rules or by any local ordinance, or in which persons engaged in

any of the acts or simulate any of the acts prohibited by said Rules, whether or not the live entertainment or pictures are obscene and whether or not such Plaintiff has knowledge thereof. Said Rules further deprive Plaintiffs of their right to free speech because they regulate the manner in which live entertainment may be presented in their licensed premises without such regulations being necessary to fulfill a compelling public purpose. Said Rules further deprive Plaintiffs' customers of their rights of free speech because their enforcement against Plaintiffs will deny said customers the right to watch and witness the entertainment and other communication prohibited thereby and because said Rules indirectly regulate and limit the exercise of free speech by said patrons.

18. Plaintiffs will suffer irreparable injury if said Rules [6] remain in effect or are enforced against them. If any of the Plaintiffs cease to present entertainment or pictures featuring nude persons each of said Plaintiffs will be permanently deprived of substantial income which is now generated by such entertainment. If any of the Plaintiffs refuse or fail to comply with said Rules, Defendants will cause disciplinary action to be taken against such Plaintiff, thereby subjecting him to revocation or suspension of his license to sell alcoholic beverages. Defendants will not suffer any damage or injury if enjoined from enforcing said Rules.

19. Plaintiffs are informed and believe that the Department of Alcoholic Beverage Control, acting by and through Defendants, intends to enforce said Rules on and after August 10, 1970 unless enjoined from so doing by an Order of this Court.

WHEREFORE, Plaintiffs demand a three-judge District Court be convened and that:

1. A preliminary and final injunction be issued ordering defendants, their agents, servants, employees, subordinants, attorneys, and all other persons in active concert or participation with them be and hereby are temporarily restrained from directly or indirectly:

(a) Investigating or collecting any information concerning alleged violations of Rules 143.2, 143.3, 143.4 and 143.5 of the Department of Alcoholic Beverage Control;

(b) Filing any accusations or orders or taking any other action directed toward suspending or revoking plaintiffs' licenses to sell alcoholic beverages or imposing any penalty in respect thereof for any alleged violation of said rules;

(c) Enforcing or otherwise seeking compliance by Plaintiffs or others with the requirements of said Rules. [7]

2. Plaintiffs be awarded their costs of suit, and such other and further relief as the Court deems just.

LAW OFFICES OF BERRIEN E. MOORE

By: /s/ Kenneth Scholtz

KENNETH SCHOLTZ

Attorneys for Plaintiffs [8]

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

ADOPTION OF RULE 143.2

143.2. *Attire and Conduct.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:

(1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.

(2) To employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.

(3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

(4) To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

Distr. A,D-2,F-1,F-2,G-1,G-2,I

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

ADOPTION OF RULE 143.3

143.3. *Entertainers and Conduct.* Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

Live entertainment is permitted on any licensed premises, except that:

(1) No license shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

Distr. A,D-2,F-1,F-2,G-1,G-2,I [10]

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

ADOPTION OF RULE 143.4

143.4 *Visual Displays.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

(3) Scenes wherein a person displays the vulva or the anus or the genitals.

(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

ADOPTION OF RULE 143.5

143.5 *Ordinances.* Notwithstanding any of the provisions of Rules 143.2, 143.3 and 143.4, no on-sale licensee shall employ, use the services of, or permit upon his licensed premises, any entertainment or person so attired as to be in violation of any city or county ordinance.

Effective August 10, 1970

Distr. A,D-2,F-1,F-2,G-1,G-2,I [11]

VERIFICATION

State of California, County of Los Angeles—ss.

ROBERT E. POFF, being sworn, says:

That he is one of the plaintiffs in the foregoing action; that he has read the COMPLAINT and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters be believes them to be true.

Dated: August 11, 1970.

/s/ Robert E. Poff
ROBERT E. POFF

Subscribed and sworn to before me on August 11, 1970. /s/ Lana M. Fritz, Notary Public in and for said County and State.

[Seal] [12]

First Amended Complaint for Declaratory Relief and Injunctive Relief.

United States District Court, Central District of California.

Don Mac Lean dba The Scorpio, et al., Plaintiffs, vs. The Department of Alcoholic Beverage Control of the State of California; Edward J. Kirby, as Director of the Department of Alcoholic Beverage Control, Defendants. No. 70-1770-F.

Filed: Sept. 17, 1970.

Plaintiffs allege:

1. The jurisdiction of this Court over this action is invoked under Title 28 U.S.C. 1331. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $10,000.00; and, arises under the Constitution and laws of the United States, and particularly the First and Fourteenth Amendments to the United States Constitution.

2. This action is also brought to redress by injunctive relief the deprivation, under color of state law, of rights, privileges and immunities secured to Plaintiffs by the Constitution of the United States, and particularly the First and Fourteenth Amendments thereto (42 U.S.C. 1983).

3. This is also a case where the Plaintiffs are seeking [1] a declaration of their rights under the Constitution and laws of the United States; and under Title 28 U.S.C. 2201 and 2202, this Court in a case of actual controversy within its jurisdiction may declare the rights of Plaintiffs seeking such declaration.

4. This is also an action which seeks injunctive relief restraining the enforcement, operation and execution of Department of Alcoholic Beverage Control

Rules by restraining the Department of Alcoholic Beverage Control and director and their agents, servants or employees in the enforcement and execution of such rules based upon the ground that the rules, on their face and as applied to these Plaintiffs, violate the provisions of the First and Fourteenth Amendments to the United States Constitution and therefore, pursuant to Title 28 U.S.C. 2281 and 2284, the application for such injunctive relief should be heard and determined by a District Court of Three Judges.

5. Plaintiffs' loss of revenue, if the execution of the rules are not enjoined, will be in excess of $10,000.00, exclusive of interest and costs.

6. Plaintiff, DON MAC LEAN, has at all times been doing business at 11314 Vanowen, North Hollywood, California, under the fictitious name THE SCORPIO, having duly complied with all of the provisions of Sections 2466-68 of the Civil Code of the State of California.

7. The other Plaintiffs are joined pursuant to Federal Rules of Civil Procedure Section 20A in that all Plaintiffs have a common interest in the subject matter and have identical questions of fact and law. The other Plaintiffs joined are identified as to name, capacity, address and California Civil Code 2466-68 compliance in Exhibit "B", a copy of which is attached hereto and incorporated herein as if fully set forth at length.

8. Plaintiffs have at all times held and still hold on-sale liquor licenses and/or beer licenses issued by Defendant [2] DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA ("Department"); and that at all times said

licenses were and still are valid and in full force and effect.

9. Plaintiffs' business is that of exhibiting pictorial nude entertainment and presenting interpretative nude dancing for the enjoyment and amusement of adult customers visiting Plaintiffs' said business premises, all of which entertainment is not obscene. Said dancing is commonly known as "topless" and/or "bottomless" and, in rhythm with popular music, is choreographed as the "frug", the "swim", the "popcorn", "walking the dog" and the "watusi". Plaintiffs provide further entertainment by employing "topless waitresses" to serve food and beverages to Plaintiffs' adult customers.

10. Plaintiffs' business, in offering such entertainment in a cafe-restaurant atmosphere, is compatible with the socio-economic structure of today's inner city. The modern cafe-restaurant, in contributing to and encouraging social communications (political, business or entertainment), is more popular than the most elaborate convention or recreation facility.

11. The entertainment herein referred to cannot be viewed from without Plaintiffs' premises, and Plaintiffs have posted signs at the entrance which state: "WARNING: THIS ESTABLISHMENT OFFERS NUDE ENTERTAINMENT. IF YOU WOULD BE OFFENDED, DO NOT ENTER." Plaintiffs entertainment is not made available to children and does not intrude upon the sensitivities or privacy of the general public. In offering such artful entertainment, Plaintiffs are exercising fundamental rights of free expression, as guaranteed by the Federal Constitution.

12. That on July 9, 1970, the Department duly adopted Rules 143.2, 143.3, 143.4 and 143.5, becom-

ing effective August 10, 1970. The said rules apply to Plaintiffs' business and regulate the dress and conduct of waitresses and entertainers, and the [3] exhibition of motion and still pictures. A complete and accurate copy of said Rules is attached hereto as Exhibit "A" and incorporated herein by reference.

13. That Defendants have threatened to enforce and prosecute, and do now threaten to enforce and prosecute, Rules 143.2-143.5 to prevent Plaintiffs from offering and providing their said entertainment.

14. That violations of any and all of said Rules will subject Plaintiffs' said Alcoholic Beverage Licenses to revocation by Defendant under Business and Professions Code 24200, which provides in pertinent part as follows:

> "The following are the grounds which constitute a basis for the suspension or revocation of licenses: (b) . . . The violation or the causing or the permitting of a violation by a licensee of . . . any Rules of the Department. . . ."

15. That violations of any or all of said Rules will subject Plaintiffs to arrest, prosecution, conviction, fine and/or imprisonment by Defendants under the Business and Professions Code, which provides in pertinent part as follows:

> "Sec. 25617. Every person convicted for a violation of any of the provisions of this division for which another penalty or punishment is not specifically provided for in this division is guilty of a misdemeanor and shall be punished by a fine of not more than Five Hundred Dollars ($500) or by imprisonment in the County Jail for not more than 6 months, or by both such fine and imprisonment."

"Sec. 25619. Every peace officer and every [4] District Attorney in this State shall enforce the provisions of this division and shall inform against and diligently prosecute persons whom they have reasonable cause to believe offenders against the provisions of this division. Every such officer refusing or neglecting to do so is guilty of a misdemeanor."

16. That Plaintiffs will suffer great irreparable damage, injury and harm by the enforcement and prosecution, and threatened enforcement and prosecution, by Defendants of Rules 143.2-143.5 in that the following shall immediately result:

(a) Supressing and censoring Plaintiffs' right to free expression, amusement and entertainment under the Federal Constitution;

(b) Impeding and preventing Plaintiffs from engaging in the lawful business of offering and providing expression, amusement and entertainment;

(c) Depriving Plaintiffs of gain and profit to be derived from the operation of their said businesses;

(d) Depriving Plaintiffs of property through the revocation of their on-sale alcoholic beverage licenses;

(e) Subjecting Plaintiffs to the threat, fear and fact of repeated and numerous accusations for the violation of said Rules, and to the inconvenience and expense of defending against repeated and numerous administrative hearings for the [5] violation of said Rules;

(f) Subjecting Plaintiffs to the threat, fear and fact of repeated and numerous arrests for the violation of said Rules, to the inconvenience and expense of defending against repeated and numerous prosecutions for the violation of said Rules, and to the threat fear and fact of repeated and numerous fines and/or imprisonments for the violation of said Rules; and

(g) Depriving Plaintiffs of their good reputation as law abiding citizens.

17. Plaintiffs have no other plain, speedy or adequate remedy at law, Section 23090.5 of the Business and Professions Code providing as follows:

"No Court of this State, except the Supreme Court and the Court of Appeal to the extent specified in this Article, shall have jurisdiction to review, affirm, reverse, annul or correct any Order, Rule or Decision of the Department or to suspend, stay or delay the operation or execution thereof, or to restrain, enjoin or interfere with the Department in the performance of its duties, but a Writ of Mandate shall lie from the Supreme Court or the Courts of Appeal in any proper case."

18. Plaintiffs petitioned the Court of Appeal, Second Appellate District, for a Writ of Mandate in this matter (Second Civil No. 37007). That on August 6, 1970, the said Petition to Court of Appeal was summarily denied. [6]

19. Plaintiffs on August 7, 1970, petitioned the Supreme Court of the State of California for a Writ of Mandate in this matter (Civil Matter No. 37007).

That on September 3, 1970, the said Petition to the Supreme Court was summarily denied.

20. Plaintiffs have not exhausted the administrative remedies that may be available by law because same are inadequate, and to do so would cause irreparable injury in that Plaintiffs would be subject to an unconstitutional prior restraint as recognized under the doctrine of *Freedman v. Maryland,* 380 U.S. 51, and *Burton v. Municipal Court,* 68 C.2d 684.

21. The Defendant, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA, is the administrative agency duly empowered and vested with the authority to license and discipline businesses such as Plaintiffs.' The Defendant, EDWARD J. KIRBY, is the Director of Defendant Department.

22. Plaintiffs contend and Defendant denies that the said Rules are void, unconstitutional and beyond the Department's jurisdiction for each and all of the following reasons:

(a) The Rules violate the First, Fourth, Fifth, Ninth and Tenth Amendments to the Constitution of the United States;

(b) Article 20, Section 22 of the California Constitution and Business and Profession Code Section 24200 is an excessive grant of power to the Department for the regulation of activities protected by the First Amendment to the Constitution of the United States;

(c) California law does not assume Plaintiffs an adequate and prompt judicial determination of First Amendment expression; [7]

(d) The Rules violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States;

(e) The Department's Rules have no real and substantial relation to public welfare and morals under the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, Plaintiffs pray that:

1. For a judicial declaration stating that Department of Alcoholic Beverage Control Rules No. 143.2-143.5 are unconstitutional, null and void as violative of the First, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution.
2. That a permanent injunction issue restraining and enjoining the Defendants, their agents, servants and employees, directly or indirectly, from enforcing Alcoholic Beverage Control Rules 143.2-143.5.
3. That pending hearing on the permanent injunction, a preliminary injunction and temporary restraining order issue restraining and enjoining Defendants, their agents, servants and employees from directly or indirectly enforcing Department of Alcoholic Beverage Control Rules 143.2-143.5.
4. For convening of a three Judge statutory district court pursuant to Title 28 U.S.C. 2281 and 2284. [8]
5. For such other and further relief as this Court deems just and proper.

WARREN I. WOLFE and
DONALD J. BOSS
By /s/ Warren I. Wolfe
WARREN I. WOLFE
Attorneys for Plaintiff [9]

VERIFICATION

State of California, County of Los Angeles—ss.

I am one of the Plaintiffs regarding the above-captioned matter. I have read the foregoing FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF, and I do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ Richard Primm
RICHARD PRIMM

Subscribed and sworn to before me this 16 day of September, 1970. /s/ Donald J. Boss, Notary Public of the State of California.

[Seal] [10]

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

ADOPTION OF RULE 143.2

143.2. *Attire and Conduct.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:

(1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.

(2) To employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.

(3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

(4) To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

Distr. A,D-2,F-1,F-2,G-1,G-2,I

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

ADOPTION OF RULE 143.3

143.3 *Entertainers and Conduct.* Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

Live entertainment is permited on any licensed premises, except that:

(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

Distr. A,D-2,F-1,F-2,G-1,G-2,I

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

ADOPTION OF RULE 143.4

143.4. *Visual Displays.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

(3) Scenes wherein a person displays the vulva or the anus or the genitals.

(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

Effective August 10, 1970

ADOPTION OF RULE 143.5

143.5 *Ordinances.* Notwithstanding any of the pre visions of Rules 143.2, 143.3 and 143.4, no on-sa licensee shall employ, use the services of, or perm upon his licensed premises, any entertainment or pe son so attired as to be in violation of any city or cou ty ordinance.

Effective August 10, 1970

Distr. A,D-2,F-1,F-2,G-1,G-2,I

Robert T. Richardson dba
The Peacemaker
5540 & 5540-½ Reseda Boulevard
Tarzana, California 91356
881-9009

Theresa Enterprises, Inc. dba
The Hello Doll
10910 Magnolia Boulevard
North Hollywood, California 91601
984-2400 & 877-4000

1738 Corporation, Inc. dba
El Rancho Club
1738 West 7th Street
Los Angeles, California 90017
483-5715

Satin Doll Corporation, dba
The Basement
5503 Lankershim Boulevard
North Hollywood, California 91601
769-5302

Joseph Acosta dba
The Inferno
11308 Vanowen
North Hollywood, California 91605
985-5866

Don Mac Lean dba
The Scorpio
11314 Vanowen
North Hollywood, California 91605
980-4723

John Chiampas dba
Batman A-Go-Go
21516 Sherman Way
Canoga Park, California 91303
887-6744

George Triant dba
Swinging Pussycat
18518 Sherman Way
Reseda, California
881-9578

Gus Spliankos dba
Candy Cat
21625 Devonshire
Chatsworth, California 91311
882-9663

Aristides E. Skartsaris dba
Laugh Inn
21125 Sherman Way
Canoga Park, California 91303
340-9739

Don and Alka Smith dba
The Hayloft
7550 Sepulveda
Van Nuys, California 91405
787-9861

Betty Drowatzky dba
The Red Witch
4838 Lankershim Boulevard
North Hollywood, California 91601
980-4706

Rag Time of Calif., Inc. dba
Rabbits Foot
5925 Franklin Avenue
Los Angeles, California 90028
464-9833

Roy Jones dba
The Doll House
8250 White Oak Avenue
Northridge, California 91324
881-9869

1170 Baker Corp. dba
Honey Bunny
5667 Lankershim Boulevard
North Hollywood, California 91601
769-9854

Garry R. Holt dba
Bottoms Up
5955 Van Nuys Boulevard
Van Nuys, California 91405
785-9010

5512 Sunset, Inc. dba
Batcave
5521 Sunset Boulevard
Hollywood, California 90028
464-9544

5651 Hollywood, Inc. dba
Honey Bunny
5336 Sunset Boulevard
Los Angeles, California 90027
462-9887

15110 East Ramona Corp. dba
Cats Meow
15110 East Ramona
Baldwin Park, California
337-9263

67 Sunset Strip Corporation dba
Melody Room
8852 Sunset Boulevard
Los Angeles, California 90069
652-9328

Mary Anne Jones Enterprises dba
Monty's
1222 West 7th Street
Los Angeles, California 90017
628-8582

Daniel L. Tucker dba
Topaz Cafe
2055 East 7th Street
Los Angeles, California 90021
623-2787

Richard Primm dba
The Fox
250 North Virgil Avenue
Los Angeles, California 90000
386-0060

William Kredell & Errel De Haan dba
The Gas Buggy
19657 Ventura Boulevard
Tarzana, California
342-3822

413 Sobrand Inc. dba
The Zipper Club
413 South Brand Boulevard
Glendale, California
462-6855

Stanley Egan dba
The Vanity Box
12135 Riverside Drive
North Hollywood, California
769-6323

Paul Perrier dba
Heads & Tails
21603 Devonshire
Chatsworth, California
882-2064

Irving Goldstein dba
Sherwood Forest
2742 Rowena Avenue
Los Angeles, California 90039
664-9844

David Heaps dba
Honey Bucket
5071 Melrose
Los Angeles, California
464-9908

Solomon Schneider dba
Dangler
5643 Cahuenga Blvd.
Los Angeles, California
769-8894

Jack Weinstein dba
Rawhide
14436 Victory Boulevard
Van Nuys, California
787-9561

Mel Davis dba
Switch Inn
7301-½ Van Nuys Boulevard
Van Nuys, California 91405
787-9547 & 780-5244

Gus Peters dba
Orchid Gal
1931 West Sixth Street
Los Angeles, California 90017
483-8403

Martin Steinberg dba
The Hideout
7707 Sepulveda Boulevard
Van Nuys, California 91405
781-9687

EXHIBIT "B" [15]

Stipulation and Order to Amend Answer.

United States District Court, Central District of California.

Robert La Rue, et al., Plaintiffs, v. State of California, et al., Defendants. No. 70-1751-F

Filed: Oct. 19, 1970.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that the answer herein be, and the same may be amended in accordance with the First Amended Answer attached hereto.

DATED: October 19, 1970.

LAW OFFICES OF HARRISON
W. HERTZBERG
By /s/ ILLEGIBLE

THOMAS C. LYNCH
Attorney General

/s/ L. Stephen Porter
L. STEPHEN PORTER
Deputy Attorney General

Attorneys for Defendants

ORDER

Upon reading and filing the within Stipulation, and good cause appearing therefor, it is SO ORDERED.

DATED: Oct. 19, 1970

By /s/ ILLEGIBLE
JUDGE

First Amended Answer.

United States District Court of the Central District of California.

Robert La Rue, dba The Buckit; Vito Tasselli, dba The Golden Garter; Street Combers, Inc., dba The Body Shop; La Vien Rose, Inc., dba Big Al's; Sailer Inn, Inc., dba The Classic Cat; Robert F. White, dba The Briar Patch; Herbert Newman, dba The Rabbit's Foot; Vinot Enterprises, Inc., dba Hi-Life Theater; Walter C. Robson, dba The Phone Booth; Petan, Inc., dba Jazz A-Go-Go; Ron Walton, dba The Whale House; The Golden Lion, Inc., dba Sir Greg's; Fred Chevalier, dba The Cherry Pit; Los Angeles Losers, Inc., dba The Losers; Carolina Enterprises, Inc., dba Carolina Lanes; Tommie J. Robins, dba King of Hearts; Maverick Tavern, Inc., dba The Wild Goose; King Henry VIII, Inc., dba King Henry VIII; Angelo E. Gianone and Josephine R. Van Epps, dba Gianone's Steak House; Jeri Dean; Christi Lee; Teri Wang; Judy Mohrmand; Brenda Turner; Madeline Webb; Traci Day; Bonnie Myers; Pat Dupre; Angel Rey Li En Chaing; Pauline Williams; LaSandra Mays; Sami Davis; Martha Vaughn; Jean Chanel; Carole McKelvey; Joni Allen; and Louann Wells, Plaintiffs v. State of California, and Edward J. Kirby, Director of Alcoholic Beverage Control, Defendants. No. C-70 1751-F [1]

COME NOW the defendants and make this their First Amended Answer to the complaint filed herein

and for such Answer admit, deny and allege as follows:

FIRST CAUSE OF ACTION

1. Admit the allegations contained in Paragraphs I through VIII, inclusive, X through XIII, inclusive, XV, XVII, XX, XXIII, XXV, and XXVI.

2. Answering Paragraph IX, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

3. Answering Paragraphs XV and XVI, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein save and except to admit that the plaintiffs' establishments are open to the public.

4. Deny the allegations contained in Paragraphs XVIII, XIX, XXI, and XXII.

5. Answering Paragraph XXIV, admit the allegations contained therein save and except defendants deny this action involves a threatened forfeiture of a property right.

SECOND CAUSE OF ACTION

6. Answering Paragraph XXVII, defendants incorporate by reference and make a part hereof, the same as if fully set forth herein, the admissions, denials and allegations contained in Paragraphs 1 through 6 of their Answer to the First Cause of Action.

7. Deny the allegations concerning Rule 143.3 in Paragraphs XXVIII and XXIX.

THIRD CAUSE OF ACTION

8. Answering Paragraph XXX, defendants incorporate by reference and make a part hereof, the same as if fully set forth [2] herein, the admissions, denials and allegations contained in Paragraphs 1 through 6 of their Answer to the First Cause of Action.

9. Answering Paragraph XXXI, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegation contained in the first paragraph of Paragraph XXXI; deny the allegations contained in the second paragraph of Paragraph XXXI.

10. Deny the allegations contained in Paragraph XXXII.

FOURTH CAUSE OF ACTION

11. Answering Paragraph XXXIII, defendants incorporate by reference and make a part hereof, the same as if fully set forth herein, the admissions, denials and allegations contained in Paragraphs 1 through 6 of their Answer to the First Cause of Action.

12. Admit the allegations contained in Paragraph XXXIV.

13. Deny the allegations contained in Paragraph XXXV.

FIFTH CAUSE OF ACTION

14. Answering Paragraph XXXVI, defendants incorporate by reference and make a part hereof, the same as if fully set forth herein, the admissions, denials and allegations contained in Paragraphs 1 through 6 of their Answer to the First Cause of Action.

15. Admit the allegations contained in Paragraphs XXXVII and XXXVIII.

16. Answering Paragraph XXXIX, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

17. Deny the allegations contained in Paragraph XL and XLI.

18. Answering Paragraph XLII, deny the allegations [3] contained therein save and except those pertaining to the prior actions of the state courts of California.

FIRST AFFIRMATIVE DEFENSE

Defendants are immune from suit under the Civil Rights Statutes.

SECOND AFFIRMATIVE DEFENSE

Plaintiff corporations are not within the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution and do not have standing to sue for alleged violations thereof.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs have standing to sue only for alleged violations of their civil rights, plaintiffs do not have standing to sue for the alleged violations of the civil rights of other persons.

WHEREFORE, defendants pray that sections 143.3 and 143.4 of Title IV of the California Administrative Code be declared valid; that plaintiffs be denied a preliminary and a permanent injunction; that plaintiffs be denied money damages; and that defendants be awarded the costs of suit incurred herein and for such other and further relief as the Court deems just and proper in the premises.

DATED: October 16, 1970

THOMAS C. LYNCH,
Attorney General
/s/ L. Stephen Porter
L. STEPHEN PORTER
Deputy Attorney General
Attorneys for Defendants [4]

Answer.

United States District Court, Central District of California.

Jerry D. Jennings, dba Sugar Shack, Erwin A. Rohm, dba Chee Chee, Raymond Rohm, dba Firehouse, Richard Carson and Robert A. Warner, dba Tuscan Room, Seemaygro, Inc., a California Corporation, dba Sarong Gals, Robert E. Poff, dba 1st King, Edward Grimes, dba The Circle, Harry J. Coleman, dba Hi Dollie and Everett L. Butts, dba The Worlock, Plaintiffs, v. Edward J. Kirby, Director of the Department of Alcoholic Beverage Control of the State of California, John J. Canney, Assistant Director of the Department of Alcoholic Beverage Control of the State of California, John A. Kelly, Orange County District Administrator of the Department of Alcoholic Beverage Control of the State of California, James F. Meehan, Long Beach District Administrator of the Department of Alcoholic Beverage Control of the State of California, Kermit Q. Greene, Crenshaw District Administrator of the Department of Alcoholic Beverage Control of the State of California, Defendants. Civil No. 70-1782-F.

Filed: Sep. 30, 1970.

Come now the defendants and make this their Answer to the complaint filed herein and for such Answer admit, deny and allege as follows:

1. Answering Paragraph 1, admit the allegations [1] contained therein save and except defendants deny that they are acting to deprive plaintiffs or plaintiffs' customers of their rights to free speech.

2. Admit the allegations contained in Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 19.

3. Deny the allegations contained in Paragraph 17.

4. Answering Paragraph 18, admit the alleg contained therein save and except defendants that they will not suffer damage or injury if en from enforcing the Rules.

FIRST AFFIRMATIVE DEFENSE

Defendants are immune from suit under the Rights Statutes.

SECOND AFFIRMATIVE DEFENSE

Plaintiff corporations are not within the priv and imm unities clause of the Fourteenth Amen to the United States Constitution and do not have ing to sue for alleged violations thereof.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs have standing to sue only for allege lations of their civil rights, plaintiffs do not have ing to sue for the alleged violations of the civil of other persons.

WHEREFORE, defendants pray that Sections 1 143.3, 143.4, and 143.5 of Title 4 of the Calif Administrative Code be declared valid, that plai be denied a preliminary and a permanent injun and that defendant be awarded the costs of incurred herein and for such [2] other and furth lief as the Court deems just and proper in the ises.

DATED: SEPTEMBER 28, 1970

THOMAS C. LYNCH,
Attorney General
of the State of California
/s/ L. Stephen Porter
L. STEPHEN PORTER, Deputy A ney General
Attorneys for Defendants [3]

Stipulation and Order to Amend Answer.

United States District Court, Central District of California.

Don Mac Lean dba The Scorpio, et al., Plaintiffs, vs. The Department of Alcoholic Beverage Control of the State of California, Edward J. Kirby, as Director of the Department of Alcoholic Beverage Control, Defendants. Civil No. 70-1770-F

Filed: Oct. 19, 1970.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that the answer herein be, and the same may be amended in accordance with the First Amended Answer attached hereto.

DATED: October 19, 1970.

WARREN I. WOLFE and
DONALD J. BOSS
By /s/ DONALD J. BOSS
Attorneys for Plaintiffs

THOMAS C. LYNCH
Attorney General
/s/ L. Stephen Porter
L. STEPHEN PORTER
Deputy Attorney General
Attorneys for Defendants

ORDER

Upon reading and filing the within Stipulation, and good cause appearing therefor, it is SO ORDERED.

DATED: Oct. 19, 1970

/s/ ILLEGIBLE
JUDGE

FIRST AMENDED ANSWER

United States District Court, Central District of California.

Don Mac Lean dba The Scorpio, et al., Plaintiffs, vs. The Department of Alcoholic Beverage Control of the State of California, Edward J. Kirby, as Director of the Department of Alcoholic Beverage Control, Defendants. Civil No. 70-1770-F

Come now defendants and make this their Answer to the amended complaint filed herein and for such Answer admit, deny and allege as follows:

1. Admit the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 12, 13, 14, 17, 18, 19 and 21.

2. Deny the allegations contained in paragraphs 10, 15, 16, 20 and 22.

3. Answering paragraphs 9 and 11, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein save and except defendants deny that plaintiffs are exercising rights of free expression. [1]

FIRST AFFIRMATIVE DEFENSE

Defendants are immune from suit under the Civil Rights Statutes.

SECOND AFFIRMATIVE DEFENSE

Plaintiff corporations are not within the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution and do not have standing to sue for alleged violations thereof.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs have standing to sue only for alleged violations of their civil rights, plaintiffs do not have standing to sue for the alleged violations of the civil rights of other persons.

WHEREFORE, defendants pray that sections 143.2, 143.3, 143.4 and 143.5 of Title IV of the California Administrative Code be declared valid, that plaintiffs be denied a preliminary and a permanent injunction, and that defendants be awarded the costs of suit incurred herein and for such other and further relief as the court deems just and proper in the premises.

DATED: October 16, 1970.

THOMAS C. LYNCH
Attorney General

/s/ L. Stephen Porter
L. STEPHEN PORTER
Deputy Attorney General

Attorneys for Defendants [2]

Pretrial Order.

United States District Court, Central District of California.

Robert La Rue, etc., et al., Plaintiffs, vs. State of California, et al., Defendants. Civ. No. 70-1751-F.

Don Mac Lean, etc., et al., Plaintiffs, vs. The Department of Alcoholic Beverage Control, Etc., Defendants. Civ. No. 70-1770-F. [1]

Jerry D. Jennings, etc., et al., Plaintiffs, vs. Edward J. Kirby, etc., et al. Defendants. Civ. No. 70-1782-F.

Following pretrial proceedings, pursuant to Rule 16 of the Federal Rules of Civil Procedure, and Local Rule 9 of this Court,

IT IS ORDERED:

I

These are civil actions brought by plaintiffs against the defendants for a declaration as to the constitutionality of certain regulations enacted by the defendants, and for injunctive relief with respect thereto. Plaintiffs allege that the regulations deprive them of certain rights, privileges and immunities secured to them by the Constitution and laws of the United States.

The parties to this action are as follows:

Plaintiffs consist of two groups: (1) individual, partnership and corporate California Alcoholic Beverage Licensees, and (2) individual dancers employed on licensed alcoholic beverages premises by group (1).

Defendants are the Department of Alcoholic Beverage Control of the State of California and its Director.

The pleadings which raise the issues herein are the Complaints and the Answers. [2]

ROBERT La RUE, etc., et al. v. STATE OF CALIFORNIA, #70-1751-F, DON MAC LEAN, etc., et al., v. THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, ETC., #70-1770-F, and JERRY D. JENNINGS, etc., et al., v. EDWARD J. KIRBY, etc., et al., #70-1782-F, are hereby consolidated for trial.

II

Federal jurisdiction and venue are invoked upon the following grounds:

(1) These are actions brought pursuant to 28 U.S.C.A. 1343, 28 U.S.C.A. 1331, and 42 U.S.C.A. 1983. The remedy was created by 28 U.S.C.A. 2201 and 2202, and the declaratory and injunctive relief sought requires the invocation of a Three-Judge Court as required by 28 U.S.C.A. 2281 and 2284.

(2) Venue is invoked upon the grounds that defendants are subject to service of process in the Central District of California, have been served with the complaint and summons and other documents in this district, have appeared and answered and not objected to the venue and waive any objection to venue.

III

The following facts are admitted and require no proof:

(a) Individual plaintiffs herein are citizens of the United States.

(b) Corporate plaintiffs herein are persons within the purview of 42 U.S.C.A. 1983 and 28 U.S.C.A. 1343 and 28 U.S.C.A. 1331. [3]

(c) The licensee plaintiffs were and now are doing business within the State of California, and are holders of valid on-sale alcoholic beverage licenses issued by the defendants.

(d) The non-licensee plaintiffs were and now are employed as dancers within the State of California at on-sale alcoholic beverages premises of some of the licensee plaintiffs.

(e) The defendant DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL is a department and agency of the state government of the State of California, and was and is established by the Constitution of the State of California. The defendant EDWARD J. KIRBY is the Director of said Department.

(f) The defendants enacted Department Rules 143.2, 143.3, 143.4 and 143.5, which were filed with the Secretary of State of the State of California and became effective on August 10, 1970. The Rules apply statewide and have the effect of state law. Said Rules are promulgated as Sections 143.2, 143.3, 143.4, and 143.5 of Title 4 of the California Administrative Code.

(g) All of the licensee plaintiffs offer entertainment, including dancing on a stage before the patrons, on their licensed alcoholic beverages premises. The non-licensee plaintiffs perform dances on a stage before the patrons, at the licensed beverages premises. During the course of such dances, acts or conduct occur which fall within the proscribed acts and conduct set forth in Department Rule 143.3. [4]

(h) The MAC LEAN plaintiffs present at their licensed premises films, still pictures and visual

reproductions which depict, among other things, the prohibited acts enumerated in Rule 143.4.

(i) The MAC LEAN plaintiffs employ adult females on their licensed premises to sell and serve food and beverages, including alcoholic beverages, and while so employed, are bare breasted.

(j) All of the licensee plaintiffs' premises are open to the public.

(k) The defendants intend to and will take disciplinary action against the alcoholic beverages licenses of licensees violating Department Rules 143.2, 143.3, 143.4 and 143.5.

(l) Plaintiffs will suffer irreparable injury if their on-sale alcoholic beverages licenses are suspended or revoked.

(m) An actual controversy exists between the parties and the parties desire a declaration of their rights with respect to the constitutionality of the Department Rules in question.

IV

There are no reservations as to any facts recited herein.

V

The following facts, though not admitted, will not be contested at the trial by evidence to the contrary. The defendants will not refute the following factual allegations [5] as defendants contend that as to the Department Regulations involved in these proceedings such factual matters are immaterial and irrelevant. The facts are as follows:

(a) Books and magazines containing still pictures which depict acts or conduct falling within

the proscribed acts in Department Rule 143.4 are displayed and offered for sale at some off-sale alcoholic beverages premises within the State of California.

(b) Plaintiff licensees:

(i) Prohibit the attendance of minors, and cause the entrances of their premises to be policed to assure the nonentrance of minors; and

(ii) Present entertainment that cannot be viewed from outside the premises; and

(iii) Post conspicuous signs at the entrances which read as follows: "IF YOU WOULD BE OFFENDED BY NUDE ENTERTAINMENT DO NOT COME IN", and, "WARNING, THIS ESTABLISHMENT OFFERS NUDE ENTERTAINMENT. IF YOU WOULD BE OFFENDED DO NOT ENTER"; and

(iv) Display signs and advertisements which convey only, normal description of the entertainment, e.g., "Nude Entertainment".

VI

No issues of fact remain to be litigated at the trial. There will be no oral testimony and all facts and exhibits shall be submitted to the Court in accordance with the pretrial Order. [6]

VII

Plaintiffs will offer at the trial, as their Exhibit "A", a copy of "THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY", together with the "SEPARATE STATEMENT OF CHARLES KEATING", as their only exhibit.

Defendant stipulates that no further foundation as to the authenticity need be offered, however, defendant objects to introduction thereof on the ground that it is immaterial to any issue in the case.

Defendants will offer as their Exhibit "A", the Reporter's Transcript of the proceedings held before the Department of Alcoholic Beverage Control on May 12th through the 14th, 1970, concerning Department of Alcoholic Beverage Control Rules 143.2, 143.3, 143.4 and 143.5.

Defendants will offer as their Exhibit "B", Sixty-eight (68) Exhibits introduced in connection with the proceedings on May 12th through the 14th, 1970.

VIII

It is Ordered that the following amendments to the proceedings are allowed:

(a) Attached Stipulation and Order and Amendment to Complaint of ROBERT La RUE, etc., et al., v. STATE OF CALIFORNIA; and

(b) Attached Stipulation and Order and Amendment to Answer of defendants.

IX

The parties agree that the trial of this action shall be based on the Pretrial Order and pleadings, except that the plaintiffs in ROBERT La RUE, etc., et al., v. STATE OF CALIFORNIA #70-1751-F abandon their claim for damages. [7]

X

The following issue of law, and no others, remain to be litigated at the trial:

(a) Are Alcoholic Beverage Control Rules Nos. 143.2, 143.3, 143.4 and 143.5, under the Twenty-

first Amendment of the United States Constitution and under the traditional state police powers over alcoholic beverages, unconstitutional on their face or as applied herein under the First, Fifth and Fourteenth Amendments of the United States Constitution?

XI

The contentions of the parties are:

(a) Plaintiffs contend as follows:

(1) That the Rules on their face proscribe acts and conduct which comes with in the freedom of speech guarantees of the First and Fourteenth Amendments.

(2) That the proscribed acts and conduct themselves come within the freedom of speech guarantees of the First and Fourteenth Amendments.

(3) The dancing presented by plaintiffs is protected by the First and Fourteenth Amendments.

(4) The visual displays presented by the plaintiffs are protected by the First and Fourteenth Amendments.

(5) The display of bare breasts by plaintiffs' waitresses is protected by the First and Fourteenth Amendments.

(6) The Department Rules impose a prior restraint or have a "chilling" effect on the presentation of entertainment [8] in violation of the First and Fourteenth Amendments.

(7) The Rules violate "due process" within the First and Fourteenth Amendments in that they are "overbroad".

(8) The Rules proscribe conduct which is constitutionally protected under STANLEY V. GEORGIA, 394 U. S. 557 (1969).

(9) The Rules violate "due process" within the First, Fifth and Fourteenth Amendments in that men of common intelligence must necessarily guess at what "simulated" sexual conduct, "mingle" and the other terms mean.

(10) The Rules deny plaintiffs equal protection of the law within the Fourteenth Amendment, in that they apply only to on-sale licensees.

(b) Defendants contend as follows:

1. *Freedom of speech - First and Fourteenth Amendments:*

1-A The non-verbal acts and conduct proscribed by the regulations are not themselves within the freedom of speech guarantee of the First and Fourteenth Amendments.

1-B The non-verbal acts and conduct proscribed by the regulations are not, and may not be, so inseparably intertwin-[9]ed with other non-proscribed activities enjoying freedom of speech protection so as to bring the proscribed acts and conduct within the freedom of speech guarantee of the First and Fourteenth Amendments.

1-B(a) The regulations proscribe specific acts and conduct. The regulations do not prohibit the employment of waitresses or the presenting of entertainment including dancing and motion pictures.

1-B(b) The sale and serving of alcoholic beverages is not within the freedom of speech

guarantee of the First and Fourteenth Amendments.

1-B(c) Entertainment, including dancing and motion pictures is not per se within the freedom of speech guarantee of the First and Fourteenth Amendments.

1-B(d) None of the proscribed acts and conduct are requisite elements in the function of a [10] waitress or in the presenting of entertainment, including dancing and motion pictures.

1-C Assuming, arguendo that the proscribed acts and conduct are within the freedom of speech guarantee of the First and Fourteenth Amendments, there is, nevertheless, a sufficiently important state interest in proscribing such non-verbal acts and conduct to justify the incidental restriction, if any, on the speech element or activity associated therewith.

1-C(a) A state has broad constitutional powers traditionally and under the Twenty-first Amendment to the United States Constitution, to prescribe and regulate the conditions under which alcoholic beverages may be sold, used and disposed of within its borders.

1-C(b) The regulations are in furtherance of important state interests in the regulation and control of the conditions surrounding the sale and consumption of alcoholic beverage on state licensed beverages premises. [11]

1-C(c) The regulations are not directed at the suppression of free speech.

1-C(d) The regulations are no greater in scope than what is essential to the furtherance of the state's interest.

1-C(e) *STANLEY V. GEORGIA* and other criminal obscenity statute cases are not applicable nor controlling as to these regulations. The regulations are not criminal obscenity statutes and apply only to state licensed public alcoholic beverages premises.

1-D The regulations do not place a "chilling effect" on freedom of speech and do not constitute a prior restraint on speech.

1-E *If* any part of a regulation is determined to be invalid under the free speech guarantee of the First and Fourteenth Amendments, the remaining provisions of the regulation should be declared valid. Each regulation was enacted with a severability provision.

2. *Due process - Fifth and Fourteenth Amendments.*

2-A The acts and conducts proscribed by the regulations are clearly specified and identified and are not vague or overbroad so as to constitute a denial [12] of due process in violation of the Fifth and Fourteenth Amendments.

2-B The state created "privilege" of selling alcoholic beverages is not a "right" or "property" of federal or state citizenship under the Fifth and Fourteenth Amendments.

2-C The due process clauses of the Fifth and Fourteenth Amendments are not controlling with respect to a state's alcoholic beverage con-

trol laws under the Twenty-first Amendment and the state's traditionally broad police powers over alcoholic beverages.

2-D *If* any part of a regulation is determined to be invalid under the due process clause of the Fifth and Fourteenth Amendments, the remaining provisions of the regulation should be declared valid. Each regulation was enacted with a severability provision.

3. *Equal Protection-Fourteenth Amendment.*

3-A Regulation 143.4 does not apply to books or magazines containing still pictures, hence there is no discrimination between on-sale and off-sale alcoholic beverages premises.

3-B That these particular regulations apply only to on-sale alcoholic beverages premises and not to off-sale alcoholic beverages premises is a proper classification and does [13] not violate the equal protection clause of the Fourteenth Amendment.

3-C The equal protection Clause of the Fourteenth Amendment is not controlling with respect to a state's alcoholic beverages control laws under the Twenty-first Amendment, and the state's traditionally broad police powers over alcoholic beverages.

3-D *If* any part of regulation 143.4 is determined to be invalid under the equal protection clause of the Fourteenth Amendment, the remaining provisions of the regulation should be declared valid. Regulation 143.4 was enacted with a severability provision.

The foregoing admissions have been submitted by the parties and the parties having specified the foregoing issues of fact and law remaining to be litigated, this Order shall supplement the pleadings and govern the course of the trial of this case, unless modified to prevent manifest injustice.

Dated: this 29th day of October, 1970.

ILLEGIBLE
JUDGE UNITED STATES
DISTRICT COURT.

Approved as to form and content: Law Offices of Harrison W. Hertzberg, By /s/ ILLEGIBLE
Attorneys for La Rue, etc., Warren J. Wolfe and Donald J. Boss, By /s/ ILLEGIBLE
Attorneys for Mac Lean, etc., [14] Law Offices of Berrien E. Moore, By /s/ Kenneth Scholtz, Attorneys for Jennings, etc., Thomas C. Lynch, Attorney General, by /s/ L. Stephen Porter, Attorneys for Defendants. [15]

Memorandum Opinion.

In the United States District Court, Central District of California.

Robert LaRue, etc., et al., Plaintiffs v. State of California, et al., Defendants. Civil No. 70-1751-F.

Don MacLean, etc., et al., Plaintiffs v. The Department of Alcoholic Beverage Control, etc., Defendants. Civil No. 70-1770-F.

Jerry D. Jennings, etc., et al., Plaintiffs v. Edward J. Kirby, etc., et al., Defendants. Civil No. 70-1782-F.

Before: Hon. Walter Ely, Circuit Judge,
Hon. William P. Gray, District Judge, and
Hon. Warren J. Ferguson, District Judge.

FERGUSON, District Judge:

In 1967, the California Supreme Court, in an obscenity case, declared:

> "The United States Supreme Court has wisely [1] recognized that ultimately the public taste must determine that which is offensive to it and that which is not; a public taste that is sophisticated and mature will reject the offensive and the dull; it will in its own good sense discard the tawdry, and once having done so, the tawdry will disappear because its production and distribution will not be profitable. Understandably, such maturity does not come quickly or easily, and, in a time when the strictures of Victorianism have been replaced by wide swings of extremism, it seems hopelessly remote." *People v. Noroff*, 67 Cal. 2d 791, 796-97 (1967).

After that statement by California's highest court, it is somewhat surprising that a federal district court four years later is called upon to determine whether a state administrative agency may require "fig leaves" to be worn by entertainers in California.

These three actions are brought pursuant to 28 U.S.C. §§ 1331, 1343, 2201 and 2202, and 42 U.S.C. § 1983, by various holders of California liquor licenses and dancers at licensed premises. A three-judge court was convened in accordance with 28 U.S.C. §§ 2281 and 2284. The actions seek to enjoin the enforcement of certain statewide rules adopted by the Department of Alcoholic Beverage Control and Edward J. Kirby, its director. The parties, by pre-trial stipulations and orders, have acknowledged proper jurisdiction and venue in this court.

Rules in Issue

The Department is established pursuant to Article 20, Section 22 of the California Constitution. That section provides in part: [2]

> "The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude."

That paragraph of the state constitution has been interpreted to reject the contention of the Department that its power over denial, suspension and revocation of liquor licenses is limitless and absolute. It was held that the Department's power over such matters is subject to reasonable legislative enactment. *Kirby v. Alcoholic Beverage Control Appeals Board*, 71 Cal. 2d 1200 (1969); *Samson Market Co. v. Alcoholic Beverage Control Appeals Board*, 71 Cal. 2d 1215 (1969); *Big Boy Liquors, Ltd. v. Alcoholic Beverage Control Appeals Board*, 71 Cal. 2d 1226 (1969).

The Department adopted Rules 143.2, 143.3, 143.4 and 143.5, effective August 10, 1970. The Rules, which are set forth in Appendix A, state generally that certain entertainment on premises licensed by the Department is contrary to public welfare and morals and no liquor license may be held at any establishment where such entertainment is permitted. In [3] summary they provide:

(1) 143.2—prohibits topless waitresses.

(2) 143.3—

(a) prohibits nude entertainers;

(b) regulates the content of entertainment;

(c) requires that certain entertainers perform on a stage.

(3) 143.4—regulates the content of movies.

(4) 143.5—prohibits any entertainment which violates a city or county ordinance.

The plaintiffs originally challenged all four Rules. However, at oral argument they withdrew their objections in these actions to the Rules which (1) prohibit topless waitresses, (2) permit local regulations, and (3)

require certain entertainers to be on a stage. The plaintiffs thus concede that topless waitresses are not within the protection of the First Amendment; that local ordinances must be independently challenged depending upon their content; and that the requirement that certain entertainers must dance on a stage is not invalid.

The court is, therefore, required to determine (1) whether Rule 143.4, which regulates the content of movies, is unconstitutional, and (2) whether those portions of Rule 143.3 which regulate the content of live entertainment are prohibited by the First, Fifth and Fourteenth Amendments.

Doctrine of Abstention

Prior to the determination of the merits of the litigation, it must be determined whether this court should stay its hand pending state court determination. In *Wisconsin v. Constantineau,* 39 U.S.L.W. 4128 (Jan. 19, 1971), the Supreme Court invalidated a state law relating to liquor matters due to constitutional infirmities. Under ordinary circumstances, this court might have [4] adopted the reasoning of Mr. Justice Black in his dissenting opinion, when he stated: "I believe it is unfair to Wisconsin to permit its courts to be denied the opportunity of confining this law within its proper limits if it could be shown that there are other state law provisions that could provide such boundaries." 39 U.S.L.W. at 4131.

However, certain of the plaintiffs in this action have been to state court on many occasions to challenge the Rules, but the state courts have refused to assume jurisdiction over their complaints. The California Attorney General has requested the state courts to assume jurisdiction over the litigation presented here, but, reject-

ing that request, the state courts have refused. The Attorney General, furthermore, has asked that this court not abstain but decide the merits of the litigation.

It, therefore, appears that the doctrine of abstention should not be applied, and this court has the obligation to decide another state obscenity case before the state courts have ruled.[1] However, in order to place the litigation in proper focus, a discussion of the obscenity laws as propounded by the California Supreme Court, as well as the United States Supreme Court, is necessary.

Background

In 1965, a dancer in a California nightclub danced with her breasts exposed. The California Supreme Court, in *In re Giannini*, 69 Cal. 2d 563 (1968), held that she could not be convicted of either lewd conduct or indecent exposure in the absence of proof that her dance was obscene. The court stated:

> "Nor can we accept the prosecution's sweeping argument that 'standards required of an obscenity prosecution are inapplicable in this case' because the 'conduct standing alone is clearly [5] unlawful' and does not become Lawful 'because it is engaged in during an activity' which would be

[1]With all due respect to Judge Gray, his dissenting opinion warrants the reemphasis of two significant points. First, all parties involved agree that the California courts have refused to consider the significant constitutional questions which confront us. Second, all of the parties insist that this court *should* resolve these issues. The majority's respect for the California courts is no less than that entertained by Judge Gray, but when the California courts refuse to decide the issues, and when those issues are presented to us under orderly procedures authorized by law, we cannot abdicate our constitutional responsibility until some indefinite time which may never arrive.

afforded First and Fourteenth Amendment protections. Petitioner's apparent 'unlawful conduct' consisted of the baring of her breasts; the thrust of the argument presumably is that since such conduct could not be lawfully engaged in at any place and any time and under any and all circumstances it is not entitled to constitutional protection when performed in the different context of a theatrical performance.

"The conduct here of course took place during a theatrical performance of a dance before an audience. We have previously explained that such a dance enjoys constitutional protection. The proper issue here therefore turns on whether the alleged unlawful conduct, which is inextricably a part of the dance, forfeits constitutional protection because of its alleged obscene nature.

"To isolate the questioned conduct and to judge it in an entirely different context would be to distort the nature of this case. By fictitiously changing the manner and place of its performance the prosecution would make the conduct criminal although in the actual manner and place of its performance the conduct should be tested by constitutional standards.

"Thus acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be [6] obscene. Respondent's contention would automatically reject the application of the law of obscenity to the instant case. It would adjudicate Iser's conduct as if it were not performed on the

stage, not a dance, and not incorporated in a form of communication. Yet the entire point of the case is that the conduct occurred in that very context."

Then, in 1968, Robert G. Barrows produced a one-act play in Hollywood, named "The Beard". The play ended with a simulated sex act, and the producer and actors were arrested for violating California Penal Code Sections involving disorderly conduct and obscenity. The California Supreme Court, in *Barrows v. Municipal Court,* 1 Cal. 3d 821 (1970), held that the disorderly conduct statute did not pertain to theatrical performers, and that the then existing California obscenity laws did not encompass live performances as distinguished from books, film and pictures. It was not until November of 1970 that the legislature enacted Section 311 (g) of the California Penal Code, which for the first time placed live entertainment within the ambit of the obscenity statutes.

It may be asserted that parts of the Rules are invalid because they do not conform to the obscenity statutes enacted by the California Legislature in light of the trilogy interpreting the relationship between the legislature and the Department (*Kirby, Samson Market Co.* and *Big Boy Liquors, Inc., supra*). However, that issue is one which does not involve the Federal Constitution and, therefore, is not before this court.

In the meantime, law enforcement agencies were upset with the decisions of the United States and California Supreme Courts in the field of obscenity. In May of 1970, the Department of Alcoholic Beverage Control began hearings on the Rules [7] which are

the subject of this litigation. Law enforcement agencies, counsel and owners of licensed premises and investigators for the Department testified. The story that unfolded was a sordid one, primarily relating to sexual conduct between dancers and customers. It is obvious, after reading the transcripts, that this is why the Department adopted the Rule which requires certain entertainers to perform on a stage at least six feet away from any customer. It is also obvious why the plaintiffs have abandoned their objection to that Rule. No reasonable person could claim that entertainers and customers have a constitutional right to engage in such conduct in a cocktail lounge.

However, a fair reading of the transcripts of the hearings requires the conclusion that the Department not only desired to prohibit sexual conduct between dancers and customers, but wanted to establish a set of rules which would circumvent United States and California Supreme Court decisions relating to obscenity. Excerpts from the transcripts are contained in Appendix B. It must be stated initially, that displeasure by law enforcement agencies and state administrative agencies with court decisions interpreting the scope of the First Amendment cannot provide the basis for those agencies to adopt rules against entertainment which is protected by those decisions.

The Issue of Obscenity Regarding Movies

Rule 143.4 prohibits the showing of film, still pictures or other visual reproduction of certain portions of the body and conduct without regard to whether such visual portrayal is obscene.

One must be careful not to permit one's analysis of a theatrical performance to be clouded by his view of

the same conduct in a nontheatrical context. The state may certainly [8] regulate both, but the constitutional standards that must be applied to each are quite different. While both fall within the police power of the state, theatrical performances, as well as books, pictures and films, are within the protection of the First Amendment unless they are obscene.

In *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952), the Court specifically held that motion pictures are within the free speech and free press guaranties of the First and Fourteenth Amendments. More recently, the Court of Appeals for the Ninth Circuit held, in *Pinkus v. Pitchess,* 429 F.2d 416 (9th Cir. 1970), *aff'd sub nom. California v. Pinkus,* 39 U.S.L.W. 3223 (November 23, 1970), that a "stag" movie of a woman who disrobed and feigned some type of sexual satisfaction from self-induced acts is not obscene.

The State of California may, of course, prohibit obscene movies. That is not the issue here. The issue is whether or not the state may regulate the content of movies by prohibiting those which depict certain conduct, or exposure of portions of the body, without the requirement that the movies be factually and legally determined to be obscene under the standards required by the Supreme Court.

A summary of the obscenity laws is provided in *Roth v. United States,* 354 U.S. 476, 488-89 (1957):

> "The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly suscep-

tible persons. *Regina v. Hicklin,* [1868] L. R. 3 Q.B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material [9] taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." (Footnotes omitted.)

In *Memoirs v. Massachusetts,* 383 U.S. 413, 418 (1966), the Court held:

> "Under this definition [of obscenity], as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

It is clear from these cases that isolated portions of a movie cannot be extracted out of the context of the whole. To do so has been uniformly condemned by the Supreme Court. Yet this is exactly what the Department's regulation does. Moreover, it fails to consider any possible redeeming social value of the material taken as a whole and in no way takes contemporary community standards into consideration.

In regard to the social value requirement, the Court, in *Stanley v. Georgia,* 394 U.S. 557, 566 (1969), stated:

> "Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content.[10] The line between the transmission of ideas and mere entertainment is much too elusive for this court to draw, if indeed such a line can be drawn at all."

Assuming that under the California Constitution the Department has the power to prohibit the showing of obscene movies in licensed premises, it may not use a test which was specifically rejected 14 years ago by the Supreme Court.

The Issue of Obscenity Regarding Live Entertainment

Rule 143.3 regulates live entertainment and prohibits certain conduct and exposure. As stated previously, it is well settled that theatrical entertainment falls within the protection of the free speech-free press provisions of the First Amendment, made applicable to the states through the Fourteenth Amendment. *See, e.g., Jacobellis v. Ohio,* 378 U.S. 184 (1964); *Kingsley Pictures Corp. v. Regents,* 360 U.S. 684 (1959). In *In re Giannini,* 69 Cal. 2d 563, 567-68 (1968), the California Supreme Court stated:

> "Although the United States Supreme Court has not ruled on the precise question whether the performance of a dance is potentially a form of communication protected against state intrusion by the guarantees of the First and Fourteenth Amendments to the federal Constitution, the very definition of dance describes it as an expression

> of emotions or ideas. . . . The dance is perhaps the earliest and most spontaneous mode of expressing emotion and dramatic feeling; it exists in a great variety of forms and is among some people connected with religious belief and practice, as among the Mohammedans and Hindus." [11]

In that case, and *Barrows, supra,* the California Supreme Court held that dancing and live theatrical performances are within the First Amendment.

> "[T]he performance of the dance indubitably represents a medium of protected expression. To take but one example, the ballet obviously typifies a form of entertainment and expression that involves communication of ideas, impressions, and feelings. Similarly, Iser's dancing, however vulgar and tawdry in content, might well involve communication to her audience." 69 Cal. 2d at 570.

It is of no significance that expression which is protected by the First Amendment takes place in a commercial setting. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963); *Smith v. California,* 361 U.S. 147 (1959). Nor does it lose its protection due to the fact that it is presented in an unusual manner. In *Schacht v. United States,* 398 U.S. 58 (1970), Justice Black stated that a performance is a theatrical one even though it is not performed in a conventional way in a conventional place. There, a mime troop performed outside an induction station, and the Supreme Court held that its members were acting in a theatrical production. The Court stated that "theatrical productions need not always be performed in buildings or even on

a defined area such as a conventional stage. Nor need they be performed by professional actors or be heavily financed or elaborately produced." 398 U.S. at 81.

Nevertheless, the Department contends that live entertainment is not speech within the protection of the First Amendment, and relies on *United States v. O'Brien*, 391 U.S. 367 (1968). In O'Brien, the Court affirmed a conviction for burning a draft card in spite of the assertion by the [12] defendant that his action was symbolic speech. However, *O'Brien* involved destruction of a selective service registration certificate. We are not dealing with violence or destruction when the subject is nothing more than the theatrical performance of dancing.

The Court, in *O'Brien*, set forth four individual tests which a regulation in this area must meet: (1) it must be within the constitutional power of the governmental agency; (2) it must further an important or substantial governmental interest; (3) the governmental interest must be unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of that interest.

It seems clear that the regulations in question here do not meet the requirements of *O'Brien*. In light of the pre-trial stipulation, it is uncontested that none of the legitimate state interests summarized in *Redrup v. New York*, 386 U.S. 767 (1967), in the field of obscenity are involved in the present case. Minors are not allowed to view the entertainment. There is no "pandering" and the entertainment is presented in such a way that it is not forced upon unwilling individuals.

Moreover, the governmental interest which the Department seems to assert is directly related to the suppression of what may very well be non-obscene free expression. The resulting restriction on First Amendment freedoms is considerably greater than is essential to the furtherance of any legitimate state interest since the Department could, as has been done by the California Legislature, limit its prohibition to obscene entertainment.

The Rule, as it pertains to dancing, runs afoul of the [13] *Roth* decision, as does the Rule pertaining to movies. While both may be prohibited if they are obscene, neither may be prohibited unless the constitutional test of obscenity is met. One isolated act may not be taken out of context from the whole, and to be considered obscene the whole must meet the three-pronged test set forth in *Memoirs v. Massachusetts,* 383 U.S. 413 (1966).

Of course, sexual conduct between a dancer and a customer could hardly be termed a theatrical performance which is protected by the First Amendment. Hopefully, the stage requirement set forth in Rule 143.3 will have the desired effect of prohibiting such conduct.

Public Welfare and Morals

It is evident from a study of the transcripts of the public hearings that the Department enacted the Rules in an attempt to circumvent the obscenity laws, as well as to prohibit contact between dancers and customers.

The Department claims the Rules further a substantial governmental interest, such as protection of the public welfare and morals from B-girls, prostitution, narcotics and the protection of minors. The Department asserts that those problems are increased when

alcohol and possible sexual stimulation are present within the same premises. Narcotic and prostitution violations may of course be prosecuted under criminal statutes, but certainly cannot be used as a vehicle to impose censorship without complying with the law on obscenity.

The pre-trial order stipulates that it is not disputed that the plaintiffs prohibit the attendance of minors in their establishments, and that they cause the premises and customers to be policed to insure the nonentrance of minors. The pre-trial order sets forth the further undisputed facts (1) that [14] the dancing cannot be viewed from outside the premises, (2) that persons are warned at the entrances of the type of entertainment that is conducted, and (3) that there is no pandering. It is, therefore, clear that none of the legitimate state interests summarized in *Redrup v. New York*, 386 U.S. 767, 769 (1967), are involved in the present action.

Theatrical entertainment may not be prohibited without a constitutional obscenity test because the state deems it necessary to protect the public welfare and morals. That decision was made by the Supreme Court in *Stanley v. Georgia, supra*:

> "And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. . . .

"Perhaps recognizing this, Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion. But more importantly, if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to prevent crime are [15] education and punishment for violations of the law . . . .' *Whitney v. California,* 274 U.S. 357, 378 (1927) (Brandeis, J., concurring). See Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 938 (1963)." 394 U.S. at 565-67. (Footnotes omitted.)

In *Carroll v. Princess Anne,* 393 U.S. 175 (1968), despite the fact that the case involved the threat of violence, the Court held that while sanctions against the plaintiffs may take the form of criminal prosecutions for the violation of valid laws, they may not take the form of prior censorship, absent a showing in an adversary proceeding of a clear and present danger.

Justice Mosk of the California Supreme Court, in *Burton v. Municipal Court,* 68 Cal. 2d 684, 696 (1968), succinctly answered the issue when he stated, "It is clear that where First Amendment rights are concerned the statute itself and not the evidence in an individual case establishes the boundaries of permissible conduct. . . ."

A state is not free to adopt whatever procedures it pleases for dealing with obscenity. *Marcus v. Search*

Warrant, 367 U.S. 717, 731 (1961). Dancing has always presented a problem to those who see it as representing perils of pagan memories. The First Amendment, however, directs that concepts of public welfare and morality may not prohibit a dance no matter how immoral it may appear to be, unless it violates an obscenity statute that meets the test of *Roth*. Clearly the Rules as they pertain to entertainment do not meet that test and were, in fact, designed to circumvent it.

The Twenty-First Amendment Argument

Section 2 of the Twenty-First Amendment provides that:

> "Sec. 2. The transportation or importation [16] into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

In *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), Mr. Justice Douglas held that in regard to liquor regulations the government has an unquestioned right to enact legislation to assure that the taxing power of the government over the liquor industry is effective. In *Wisconsin v. Constantineau*, 39 U.S.L.W. 4128 (January 19, 1971), he stated that the police power of the states over intoxicating liquors was extremely broad even prior to the Twenty-First Amendment, citing *Crane v. Campbell*, 245 U.S. 304 (1917). Yet it was stated by all Justices, including those who dissented on the doctrine of abstention, that the interest of a state in regulating the liquor business cannot override the Due Process Clause of the Fourteenth Amendment. If it cannot override that clause, it certainly cannot override the First Amendment, which has

always received a "preferred position" among the liberties granted to all of us. *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945).

All of the cases cited to the court by the Department interpreting the Twenty-First Amendment involved the interrelationship of that Amendment with the commerce clause and the import-export clause of the Constitution. It is clear that other clauses in the Constitution may not be used to restrict obscenity without complying with the standards established by the Supreme Court. *See Blount v. Rizzi*, 39 U.S.L.W. 4120 (January 14, 1971).

While it is true that one does not have an absolute right to receive a liquor license, it is equally true that the state cannot place an unconstitutional precondition on the [17] possession of these licenses. As the Supreme Court noted in *Sherbert v. Vernon*, 374 U.S. 398 (1963): "It is too late in the day to doubt that the liberties of . . . expression may be infringed by the denial of or placing conditions upon a benefit or privilege." The fact that no direct restraint or punishment is imposed upon the exercise of speech does not determine the free speech question. Indirect "discouragements" undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines or injunctions. *American Communications Assn. v. Douds*, 339 U.S. 382, 402 (1950). Thus, a state agency cannot exercise its constitutional power to issue, renew or revoke liquor licenses for the purpose of censoring whatever it believes to be undesirable entertainment. To allow this would allow states to circumvent the protection provided by the First Amendment and do indirectly that which they cannot do directly.

Obscenity Must be Determined by the Courts

The Supreme Court, in explicit terms, has stated that the issue of obscenity must be determined by the courts and not merely by an administrative agency, no matter how well meaning it is.

In *Freedman v. Maryland,* 380 U.S. 51 (1965), the Court held that any system of censorship must contain, at the mimimum, the following procedural safeguards if it is not to contravene the First and Fifth Amendments: (a) any restraint prior to judicial determination must be imposed only briefly; (b) the censor must go to court in a specified brief period; and (c) the safeguards must be contained in the statute itself or be supplied by judicial rule.

In *Bount v. Rizzi, supra,* the Court strengthened the requirement that even in noncriminal cases only the courts have the constitutional authority to determine obscenity, and [18] that judicial review must be a swift one. There the Court cited *Freedman v. Maryland, supra:* "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U.S. at 58.

The Rules adopted by the Department of Alcoholic Beverage Control are totally void of any requirement that the Department seek any judicial review of obscenity. The very limited judicial involvement is set forth in California Business and Professions Code §23090, which provides that:

> "Any person affected by a final order of the [Alcoholic Beverage Control Appeals Board], . . .

> may, . . . apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of such final order."

In fact, as set forth previously, the Rules were designed to circumvent court decisions dealing with obscenity and to eliminate judicial determinations. That is constitutionally impermissible.

The procedure set forth by the Rules and the California Business and Professions Code requires the licensee to challenge the decision of the Department to suppress obscenity. This method was condemned in *Blount v. Rizzi, supra,* "the scheme has no statutory provision requiring governmentally initiated judicial participation in the procedure . . ., or even any procedure assuring prompt judicial review". 39 U.S.L.Q. at 4122. Judicial review of the decisions of the Department is limited to appellate review (California Business and Professions Code §§ 23090-23090.7), which does not meet the standard required by *Freedman v. Maryland, supra,* and *Blount v. Rizzi, supra.* [19]

Summary

In summary, we hold that the Rules of the Department as written, which prohibit the content of movies and live entertainment, are void for the reason that they do not conform to the tests established by the United States Supreme Court. The other parts of the Rules, namely, those that regulate (a) the attire of waitresses; (b) the conduct between performers and customers; (c) the place where certain entertainers must perform; and (d) the adoption of local regulations provided they comport with the United States Constitution are not challenged.

Pursuant to the provisions of Rule 52 of the Federal Rules of Civil Procedure, this opinion shall constitute the findings of fact and conclusions of law of the court.

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, a judgment shall be entered in each of the three cases in favor of the plaintiffs and against the defendants as follows:

"1. Rule 143.4—*Visual Displays*—is adjudged to be in violation of the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and the defendants are enjoined from enforcing the same.

"2. Rule 143.3—*Entertainers and Conduct*—is adjudged to be in violation of the First, Fifth and Fourteenth Amendments, as it pertains to live entertainment, and the defendants are enjoined from enforcing the same. This injunction does not pertain to any sexual conduct between an entertainer and a customer.

"3. Each party shall bear its own costs. [20]

"4. The court retains jurisdiction to enforce the provisions of this judgment, for the purpose of issuing orders to clarify, modify or amend any of the provisions hereof, and for all other purposes."

Dated this 6th day of April, 1971.

/s/ Walter Ely
Walter Ely
United States Circuit Judge

/s/ Warren J. Ferguson
Warren J. Ferguson
United States District Judge [21]

APPENDIX A

"143.2 *Attire and Conduct.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:

"(1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.

"(2) To employ or use the services of any hostess or other person to mingle with the patrons while such Hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.

"(3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

"(4) To permit any employee or person to wear or use any device or covering exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

"If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, [22] and to this end the provisions of this rule are severable.

"143.3. *Entertainers and Conduct.* Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

"Live entertainment is permitted on any licensed premises, except that:

"(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

"(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six-feet from the nearest patron.

"No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

"No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

"If any provision of this rule or the application [23] thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without

the invalid provision of application, and to this end the provisions of this rule are severable.

"143.4. *Visual Displays.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

"The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

"(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

"(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

"(3) Scenes wherein a person displays the vulva or the anus or the genitals.

"(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

"If any provision of this rule or the application thereof to any person or circumstances is held invalid such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

"143.5. *Ordinances.* Notwithstanding any of the provisions of Rules 143.2, 143.3 and 143.4, no on-sale [24] licensee shall employ, use the services of, or permit upon his licensed premises, any entertainment or person so attired as to be in violation of any city or county ordinance." [25]

APPENDIX B

I

Partial Testimony of Captain Robert Devin of the Los Angeles Police Department

"CAPT. ROBERT A. DEVIN: Mr. Chairman, I'd like to introduce myself. I'm Capt. Robert Devin, commander of the administrative vice division of the Los Angeles Police Department. I have been a member of the police department in the City of Los Angeles for the past twenty-one and a half years. I have been assigned in my current assignment as the commander of the administrative vice division for the past one and a half years. Part of my responsibilities are the coordination, the review of the problem of pornography and obscenity throughout the City of Los Angeles. And in that capacity, I have formed some opinions. I believe I have documented the position that I am about to state to the group, and I'd like to share this information with the rules committee this morning.

"The Los Angeles Police Department supports all three of the rules changes that are proposed. We feel that there is a need for a measure of regulation in the field of live entertainment—rather, the field of nudity as pertains to live entertainment. Coincidentally, the City of Los Angeles is embarked at this time on a revised Cafe Entertainment Ordinance for the City of Los Angeles, that has been prompted primarily through recent court decision. The Barrows Case of January 30th, 1970, has compelled us to re-examine our cafe entertainment permit ordinance, and this is in the process of revision. As a matter of fact, it's going to be acted upon by our police commission tomorrow afternoon.

"The main position that we're taking as regards the subject of nudity in locations that are licensed by the Department [26] of Alcoholic Beverage Control, is that there is a compelling need for a separation of the entertainer from the non-entertainer. And this position is based on experience that we have had in the past one and a half years, during which time we've seen the advent and the growth of nude entertainment in our city bars.

"The former novelty of a topless female performer has now been replaced by the bottomless performer. Our first experience, our first knowledge that locations of this type were in existence in Los Angeles occurred approximately in February of 1969. In our opinion, this arose because of a California State Supreme Court decision that followed a prior federal rule, of the stated two important items. No. 1, it gave recognition to the dance as a form of expression, as a form of communication between the performer and the audience, stated, in effect, that the dance is constitutionally protected under the first amendment. And in the absence of a showing of obscenity, that a dance was constitutionally protected. And secondarily, it imposed, as part of the showing by the people, the necessity for a new contemporary community standard, and that standard would declare to be the standard of the State of California.

"While statutory law has been available to us to regulate what was formerly considered as antisocial behavior, the federal and state judicial system has, through a series of similar decisions, effectively emasculated law enforcement in its effort to contain and to control the growth of pornography, and of obscenity and of behavior that is associated with this kind of performance." [27]

II

Partial Testimony of Roy E. June, City Attorney of the City of Costa Mesa

"MR. ROY E. JUNE: Good morning, gentlemen. My name is Roy E. June, and I am the City Attorney for the City of Costa Mesa, and I am here by direction of the City Council of the City of Costa Mesa to support the director in your promulgation of rules and regulations relating to topless and bottomless entertainment.

"The vigilant and reasonable attention to these establishments by the Costa Mesa Police Department has further served to place these activities in their proper perspective. The courts, however, have not been so generous. Section 647(a) of the Penal Code, lewd and dissolute conduct, is no longer available to the prosecution. We can use it under some circumstances, but not as extensively as we could in 1967.

"Portions of Section 615½ of the Penal Code, on indecent exposure, is not as available to the prosecution as it was in the year 1967. There have been inroads on these cases.

"Regulation of live entertainment, unless so broad to be cumbersome and unworkable, is no longer available to the prosecution. It remains, I think, for the Alcoholic Beverage Control Board to effectively regulate bottomless and topless dancers, and pornographic films displayed in these establishments."

III

Partial Testimony of Richard C. Hirsch of the Office of the Los Angeles County District Attorney

"In 1969, the Los Angeles County District Attorney's [28] office filed approximately 781 cases involving bottomless dancing. And almost all of these cases involved performances which were conducted on premises licensed by the Department of Alcoholic Beverage Control. They are almost all bar-type establishments. As of January 1st, 1970, there were approximately 134 convictions under Penal Code statutes. Now, we have to consider what a conviction means in terms of the criminal law. Most of the cases filed were either under Penal Code Section 647(a) as it then applied, or Section 314.1 of the Penal Code. These are the lewd and indecent exposure statutes. Most of the dances involved totally nude dancing or bottomless-type dancing. There were a few dances, some of which I personally prosecuted which involved topless-type dancing in which the dancer would wear a bikini-type bottom and then be exposed from the waist up without any sort of covering. To convict under the statutes under which these cases were filed, it had to be proven that the dance was obscene, and it had to be proven that such a dance was obscene beyond a reasonable doubt. As you no doubt know, the lewd conduct and indecent exposure statutes use words such as 'lewd,' 'lewdly,' 'dissolute,' but these words have been held to be synonymous with obscene. Therefore, to prove that that there was a violation of the criminal law, we had to prove that the three elements of obscenity were established, and prove that these elements were stablished beyond a reasonable doubt, each to a reasonable doubt, and beyond a moral certainty. The three ele-

ments of obscenity are, number one, that the dances were substantially beyond customary limits of candor in the community, and the Supreme Court of the United States held in the Giannini case that the community which was relevant was the entire State of California. Secondly, it had to be shown that [29] the predominant appeal to the dance was to the prurient interest, and that is a shameful or morbid interest in nudity, sex or excretion. And third, it had to be shown, and beyond a reasonable doubt, each of these standards, that the dances in question were utterly without redeeming social importance.

. . .

"Take an average case. Suppose we have a bottomless dance case and there is a citation issued on the dancer. And, say, the owner of the establishment who is present for aiding and abetting, that case would then be brought into the court. Generally what would happen, and this is the procedure we find in most of the defense in most of these cases, there may be a demur to the statute by the defense on the grounds that the statute on its face is unconstitutional. We have to send a deputy into court to prosecute that demurrer. Then, generally, the defense requests a pretrial hearing. And the pretrial hearing is, in effect, a separate trial. It's a full-blown trial in which ordinarily expert testimony is taken on the part of the defense and the prosecution to establish whether or not the material, the dance in question is constitutionally protected. At that time, the judge rules on whether or not it's constitutionally protected. If he rules it is not constitutionally protected, it has been the practice for the case to go up on a writ, prohibition or mandate at that time to the appellate department of the Superior Court. At that time, we

have an appellate deputy who would represent our office in the appellate department on that case. Then the case will more often than not come back to the trial court. At that time, we will engage in a full trial, either court or jury trial, which may last anywhere from a few days to a week or more. And, of course, this involves a deputy being tied up in the court for [30] this entire period of time. So, there is, on each case, the possibility of a great deal of time being expended by trial deputies in these proceedings.

"MR. SEXTON: Well, I was interested in the —or concerned about the public welfare in asking that, wondering how much it might cost the taxpayer to have to devote this amount of man-power to this type of entertainment.

"MR. HIRSCH: I don't have any specific totals for you, but I would assume that there are totals available as to what the cost of a jury trial is in a criminal case per day, and you can figure that out in the number of days that these cases would take. And I think it would be quite a considerable amount of money, plus the fact that expert witnesses must be generally paid. They are usually professional witnesses, psychiatrists in many parts, in many cases psychologists, individuals from the arts and theater who come in and expect to receive some sort of compensation for their time in court. These fees will vary in amount, but, of course, there is that expense also, in that they are first amendment cases that need that type of testimony." [31]

(Addendum to Judge Ferguson's opinion in *LaRue, et al. v. State of California* (Nos. 70-1751-F, 70-1770-F and 70-1782-F))

GRAY, District Judge, dissenting:

It seems to me that this is a case in which our court should abstain until the courts of California have had an opportunity to consider the constitutional issues here concerned. This conclusion is reinforced by the decisions of the Supreme Court in *Younger v. Harris,* 39 U.S.L.W. 4201 (February 23, 1971) and its five companion cases[1] that were all decided on the same day, and which came after *Wisconsin v. Constantineau,* 39 U.S.L.W. 4128 (January 19, 1971), upon which the majority opinion here relies. It is true that *Younger* and its companion cases were concerned with whether a United States District Court should enjoin a currently pending state criminal prosecution, which is a somewhat different issue from the one here involved. However, a principal thrust of those opinions is to suggest to our three judge courts that we should give increased consideration to the concept of comity, which embodies ". . . a proper respect for state functions . . . and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . What the concept does represent is a system in which there is [32] sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious

[1] *Boyle v. Landry,* 39 U.S.L.W. 4207 (February 23, 1971); *Samuels v. Mackell,* 39 U.S.L.W. 4211 (February 23, 1971); *Perez v. Ledesma,* 39 U.S.L.W. 4214 (February 23, 1971; *Dyson v. Stein,* 39 U.S.L.W. 4231 (February 23, 1971); *Byrne v. Karalexis,* 39 U.S.L.W. 4236 (February 23, 1971).

though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris,* 39 U.S.L.W. 4201, 4203 (February 23, 1971). This seems to me to be a good case in which to apply this principle.

The California courts are just as able as are we to consider whether or not the subject regulations square with the United States Constitution. They should be given the opportunity so to do, and I am by no means persuaded that this record shows them to have declined to assume such responsibility.

Now that this court has determined to rule on the merits of the case at hand, I find myself again in disagreement with the majority. The question here is not simply ". . . whether a state administrative agency may require 'fig leaves' to be worn by entertainers in California" (see majority opinion, page 2). I agree with Judge Ferguson that ". . . it is well settled that theatrical entertainment falls within the protection of the free speech-free press provisions of the First Amendment . . . ." (Majority opinion, page 11.) However, this valid assertion of the law does not necessarily carry the day in deciding this case.

Dancing without fig leaves may very well be a form of artistic expression protected by the First Amendment. But such a right is not absolute. For example, the state, under its police power, certainly could prohibit nude dancing on the street corner or on the campus of a junior high school. It is also within the police power to prohibit *all* sales of alcoholic beverages and to impose reasonable [33] restrictions upon the conditions under which such sales may be made.

If we acknowledge these things, I do not think that it is beyond the constitutional right of California, through its administrative agency, to say, in its wisdom or lack of wisdom, that lewd or naked dancing (even though not necessarily obscene) and the serving of alcohol do not properly mix, and that although a person may present one or the other, he may not do both at the same place and time.

As the majority opinion indicates, it is conceded that the regulations prohibiting direct personal contact between customers and naked employees are constitutionally enforceable. The opinion also suggests that this is so because such contact and what may result therefrom are offensive to public morals. At the administrative hearing from which the subject regulations stemmed, there was testimony as to some of the horrendous things that an occasional "well-oiled" patron purportedly did to the first girl that he saw, immediately upon leaving a bar after having been aroused and "inspired" by the nude dancing. We might think up logical reasons that would warrant regulations seeking to protect the public morals against on-site offenses, and ignore any subsequent danger. But I believe that nothing in the Constitution requires such a distinction.

DATED: April 2, 1971.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge [34]

Judgment.

In the United States District Court, Central District of California.

Robert LaRue, etc., et al., Plaintiffs v. State of California, et al., Defendants. Civil No. 70-1751-F.

Don MacLean, etc., et al., Plaintiffs v. The Department of Alcoholic Beverage Control, etc., Defendants. Civil No. 70-1770-F.

Jerry D. Jennings, etc., et al., Plaintiffs v. Edward J. Kirby, etc., et al., Defendants. Civil No. 70-1782-F.

Filed: April 7, 1971.

This court having this date filed a memorandum opinion signed by the Honorable Walter Ely, United States Circuit Judge and the Honorable Warren J. Ferguson, United States District Judge, the Honorable William P. Gray, United States District Judge, dissenting, which memorandum opinion constitutes the findings of fact and conclusions of law of the court, pursuant to Rule 52 of the Federal Rules of Civil Procedure.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that a judgment is granted in each of these three cases in favor of [1] the plaintiffs and against the defendants as follows:

1. Rule 143.4—*Visual Displays*—is adjudged to be in violation of the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and the defendants are enjoined from enforcing the same.

2. Rule 143.3—*Entertainers and Conduct*—is adjudged to be in violation of the First, Fifth and Fourteenth Amendments, as it pertains to live entertain-

ment, and the defendants are enjoined from enforcing the same. This injunction does not pertain to any sexual conduct between an entertainer and a customer.

3. Each party shall bear its own costs.

4. The court retains jurisdiction to enforce the provisions of this judgment, for the purpose of issuing orders to clarify, modify or amend any of the provisions hereof, and for all other purposes.

Dated this 6th day of April, 1971.

/s/ Walter Ely
Walter Ely
United States Circuit Judge

/s/ Warren J. Ferguson
Warren J. Ferguson
United States District Judge [2]

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-36

STATE OF CALIFORNIA, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, et al.,

Appellants,

vs.

ROBERT LaRUE, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Jurisdictional Statement

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

In the Supreme Court of the United States

October Term, 1970

No.

State of California, Department of Alcoholic Beverage Control, et al.,

Appellants,

vs.

Robert LaRue, et al.,

Appellees.

On Appeal From the United States District Court for the Central District of California

Jurisdictional Statement

Appellants State of California, Department of Alcoholic Beverage Control; Edward J. Kirby, Director of the California Department of Alcoholic Beverage Control; John J. Canny, Assistant Director of the California Department of Alcoholic Beverage Control; and John A. Kelly, James F. Meehan and Kermit Q. Greene, District Administrators of the California Department of Alcoholic Beverage Control, appeal from the Declaratory Judgment and Injunction

entered on April 7, 1971, by the specially constituted three-judge United States District Court for the Central District of California. This Statement is submitted to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW

The Opinion and Judgment of the United States District Court are not yet reported. Copies of the majority and dissenting opinions are attached hereto as Appendix A. A copy of the filed Judgment is attached hereto as Appendix B.

JURISDICTION

These suits were brought in the United States District Court for the Central District of California by appellees for declaratory and injunctive relief pursuant to Title 28, United States Code, sections 2201 and 2202, and Title 42, United States Code, section 1983. Jurisdiction of the District Court was invoked pursuant to Title 28, United States Code, sections 1331 and 1343. Appellees sought a declaration that California Department of Alcoholic Beverage Control Regulations 143.2, 143.3, 143.4 and 143.5 were in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution. Since appellees sought an injunction against the enforcement of California Department of Alcoholic Beverage Control regulations, regulations of statewide applicability, a three-judge court was convened pursuant to the authority and requirements of Title 28, United States Code, sections 2281 and 2284.

The District Court's Opinion and Judgment granting declaratory and injunctive relief was entered on April 7, 1971, and appellants' Notice of Appeal to this Court was filed in the United States District Court for the Central District of

California on May 5, 1971. A copy of the Notice of Appeal is attached hereto as Appendix C.

The jurisdiction of the Supreme Court of the United States on this direct appeal is conferred by Title 28, United States Code, section 1253.

STATUTES INVOLVED

The statutes involved are California Department of Alcoholic Beverage Control Regulations 143.2, 143.3, 143.4 and 143.5 (Title 4, California Administrative Code, sections 143.2, 143.3, 143.4 and 143.5). The text of these regulations is set forth in Appendix D attached hereto.

QUESTIONS PRESENTED

Does the First Amendment protect any and all *non-verbal* conduct (including acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation and flagellation) when the conduct is presented as purported "dancing" or "entertainment" and engaged in live or displayed by film on state licensed alcoholic beverages premises?

Where *non-verbal* conduct occurring on state licensed alcoholic beverages premises contains a communicative or "speech" element sufficient to bring into play the First Amendment, may a federal court require a State to restrict itself to *obscenity* as the only basis by which such conduct may be regulated or limited, or may a State proceed against such conduct regardless of whether or not the conduct is obscene, provided the State's enactments meet the criteria set down by this Court in *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968)?

May a federal court invalidate and enjoin the enforcement of otherwise valid State regulations by assuming that improper motives prompted such enactments?

STATEMENT OF THE CASE

With the advent of so-called "topless waitresses" on state licensed on-sale[1] alcoholic beverages premises, and the progression therefrom to nudes, to live sexual acts and conduct, and to visual displays (by motion pictures) of such sexual acts and conduct, the State of California has experienced an ever increasing progression of public welfare and morals problems in connection with the operation of on-sale alcoholic beverages premises where such non-verbal acts and conduct are employed and permitted.[2]

Initially, while the situation was still in the "topless" only stage, the appellant Department of Alcoholic Beverage Control attempted to prevent the attendant and resulting injuries to the public welfare and morals by notifying such licensees to refrain from such conduct and undertaking to discipline the alcoholic beverages licenses of those who would not desist. Resultant litigation finally reached the California Supreme Court in the case of *Boreta Enterprises, Inc.* v. *Department of Alcoholic Beverage Control*, 2 Cal.3d 85, 465 P.2d 1 (1970).

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1. "On-sale" licenses in California authorize the sale and serving of alcoholic beverages to the public for consumption on the licensed premises (such as a bar), as contrasted to "off-sale" licenses authorizing sale of alcoholic beverages to the public for consumption off or away from the licensed premises (such as a package liquor store).

2. The record below (see Appendix E) establishes that when certain non-verbal acts and conduct are permitted on state licensed on-sale alcoholic beverages premises that attendant thereto, or resulting therefrom, are various injurious consequences to the public welfare and morals, including but not limited to: overt and unlawful sex acts between employees and between employees and the public; "B-girl" activity in the soliciting of drinks; prostitution; sale, possession and use of narcotics and dangerous drugs; sexual crimes including rapes, attempted rapes, and indecent exposures; other violent crimes including assaults on law enforcement officers; intemperance; exploitation of alcoholic beverages customers; and serious and extensive law enforcement problems due to the increase in criminal offenses in and around such premises.

Specifically pointing out that the hearing record before it contained only the sterile stipulation between the parties that bare-breasted waitresses were employed on the licensee's premises, the California Supreme Court held that there was no evidence in the record by which it could conclude that the evils the Department sought to prevent were related to the use of topless waitresses and, therefore, that the Department's disciplining of the license could not be sustained. The California Supreme Court then set forth:

> "Finally, although it appears unnecessary, we point out that our conclusions have been reached on the record before us. We are not unaware of the public concern for proper regulation of premises licensed to sell alcoholic beverages. Our holding confers on them neither a general sanction to employ topless of similarly undressed waitresses nor a general immunity from the Department's disciplinary action in the event they do. If such purveying of liquor is in fact attended by the deleterious consequences which the Department claims, it should have no difficulty, in appropriate disciplinary proceedings, in proving them. In a word it should establish 'good cause' and make out its case. *Alternatively, the Department could draw upon its expertise and the empirical data available to it and adopt regulations covering the situation.*" (465 P.2d at 16, emphasis added)

Following the *Boreta* decision, and the intervening intensification of problems resulting from the steady progression of sexual acts and conduct on licensed alcoholic beverages premises, the Department—seeking to prevent the "deleterious consequences" from occurring, rather than merely disciplining licenses after such damage to the public welfare and morals had already occurred—proceeded in its quasi-legislative capacity[3] to hold legislative hearings and to se-

3. The California Department of Alcoholic Beverage Control is a "constitutional agency" of California state government and is vested with self-executing powers by constitutional grant. (California Constitution, Article XX, Section 22).

cure expert opinions and the available empirical data whereby it could formulate and enact proper regulations for state licensed alcoholic beverages premises.

After the compilation of 703 pages of legislative hearing transcript and the receipt of over 67 exhibits, the Department duly enacted Department Regulations 143.2 through 143.5 (Appendix D).

Thereafter, the appellees, who are corporate and individual on-sale alcoholic beverages licensees (plus a few employees in *LaRue et al*), filed declaratory and injunctive relief actions in both the California state courts and in the United States District Court for the Central District of California. The actions basically sought to have the newly enacted regulations declared unconstitutional as in violation of the freedom of speech and due process guarantees of the First, Fifth and Fourteenth Amendments, and their enforcement by the appellant Department of Alcoholic Beverage Control and its officers enjoined. The California state courts (including the California Supreme Court and the California Court of Appeal) refused to stay the enforcement of the regulations and declined to hear the declaratory and injunctive relief actions. The federal District Court then proceeded with the actions before a specially constituted three-judge Court.

On April 7, 1971, the three-judge District Court, over the dissent of one District Judge, issued its Opinion and Judgment (Appendix A & B) holding in substance that the acts and conduct proscribed by Department Regulations 143.3 and 143.4 are within the freedom of speech guarantees of the First and Fourteenth Amendments, that such acts and conduct could be proscribed by the State only upon proper proof of their *obscenity*, that the regulations were prompted by improper motives to circumvent *obscenity* proof require-

ments, and that the said regulations were therefore invalid as in violation of the First, Fifth and Fourteenth Amendments. It is from that portion of the Judgment invalidating Department Regulation 143.3 in part and Department Regulation 143.4 in toto, and enjoining the enforcement thereof, which appellants appeal (Appendix C).

THE QUESTIONS ARE SUBSTANTIAL

Against the backdrop of the First and Twenty-first Amendments, and a State's traditionally broad police powers over the conditions surrounding the sale and serving of alcoholic beverages within a State's borders, the questions presented by these appeals involve the State of California's attempt to regulate and control certain conditions surrounding the sale and serving of alcoholic beverages on state-licensed alcoholic beverages premises, which conditions are attended by, and result in, serious and grave injuries to the public welfare and morals of the people of California.

Regulation and control over the conditions surrounding the sale and service of alcoholic beverages in California is statutorily declared by the California Legislature to involve "an exercise of the police powers of the State for the protection of the safety, welfare, health, peace and morals of the people of the State," and "involves in the highest degree the economic, social and moral well-being and the safety of the State and of all its people."[4]

The importance of alcoholic beverage control in California is further evidenced by the people's direct establishment of the California Department of Alcoholic Beverage Control in the California Constitution and the self-executing, direct constitutional grant of power from the people of California to the Department of Alcoholic Beverage Control

4. Section 23001, Calif. Alcoholic Beverage Control Act, Div. 9, Calif. Bus. & Prof. Code.

to suspend or revoke alcoholic beverages licenses upon the Department's determination that continuance of the licenses would be contrary to the public welfare or morals.[5]

On the basis of: California statutory law, officially reported decisions dealing with conditions resulting on alcoholic beverages premises when certain types of acts or conduct were permitted, several days of legislative hearings, and the gathering and review of expert opinions and available empirical data, the California Department of Alcoholic Beverage Control enacted Department Regulations 143.2 through 143.5 (Appendix D).

The majority of the District Court found Department Regulations 143.3 and 143.4 to be invalid. The District Court has done so on the basis that the non-verbal conduct proscribed by the regulations constitutes "speech" or "expression", is protected by the First Amendment, and may not be regulated by the State unless the State proves such conduct to be *obscene*. Furthermore, the majority of the District Court conclude that an improper *motive* to circumvent *obscenity* proof requirements prompted the enactments.

The error in the majority's reasoning is threefold. First, the majority assumes that all non-verbal conduct presented as purported "dancing" or "entertainment", either live or by way of film, is "speech" or "expression" and protected by the First Amendment. Secondly, the majority assumes that as to conduct falling within the protection of the First Amendment, such conduct may be regulated or limited by the State *only* upon proof that such conduct is *obscene*. Lastly, the majority assumes that enactment of the regulations was improperly motivated by a desire to circumvent the standards of proof required to establish *obscenity*.

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5. California Constitution, Article XX, Section 22. The constitutional grant of power to the Department is further augmented by an identical statutory grant of power to the Department from the California Legislature. California Alcoholic Beverage Control Act, Sections 24200(a) and 25750 (Div. 9, Calif. Bus. & Prof. Code)

I. Live Acts or Visual Displays in Public of Sexual Intercourse, Masturbation, Sodomy, Bestiality, Oral Copulation and Flagellation; Public Display of Genitalia and Anuses; and Other Such Non-Verbal Acts and Conduct, Do Not Constitute "Speech" and Are Not Within the Protection of the First and Fourteenth Amendments.

The California Department of Alcoholic Beverage Control regulations which were invalidated and enjoined by the District Court prescribe that an on-sale alcoholic beverages license may not be held at any premises where certain *non-verbal* acts or conduct are permitted, including: (1) acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation and any sexual acts prohibited by state law, (2) display of genitalia and anuses, (3) touching, caressing and fondling of breasts, buttocks, anus or genitalia, and (4) visual displays (films or slides) of the foregoing acts and conduct.

Such *non-verbal* acts and conduct do not constitute "speech" and are not entitled to the protection afforded speech by the First and Fourteenth Amendments.

While First Amendment protection has been expanded from verbal and printed speech to encompass certain non-verbal "symbolic speech" (non-verbal acts or conduct engaged in with the intent of expressing an idea or protest), this Honorable Court has recently held that even where the intent to express an idea or protest exists, this does not automatically give such "symbolic speech" First Amendment protection. As set forth by this Court in *United States v. O'Brien*, 368 U.S. 367, 376 (1968):

> "O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected 'symbolic speech' within the First Amendment. His argument is that the freedom of expression which the First

Amendment guarantees includes all modes of 'communicaton of ideas by conduct,' and that his conduct is within this definition because he did it in 'demonstration against the war and against the draft."

We cannot accept the view that an apparently endless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." (emphasis added)

And see also Mr. Chief Justice Warren's dissenting opinion, and the dissenting opinions of Mr. Justices Black, White and Fortas in *Street v. New York,* 394 U.S. 576, 594-617 (1969), a flag burning protest case in which the majority of this Court reversed the conviction on the basis that it was impossible to tell from the record if the conviction was solely for the non-verbal act of flag burning or included the words spoken by the defendant at the time he burned the flag.

Without attempting to speculate as to what, *if any,* idea or protest the person exposing his or her genitalia or anus, or the persons engaging in acts of sodomy, oral copulation, masturbation, bestiality or flagellation, are attempting to express to the public, appellants submit that such *non-verbal* acts and conduct do not have a recognized "symbolic speech" element entitling them to First Amendment protection. *Cox v. Louisiana,* 379 U.S. 559, 562-564 (1965); *Cowgill v. California,* 396 U.S. 371, 371-372 (1970); and see *Derrington v. City of Portland,* (Ore.), 451 P.2d 111, certiorari denied 396 U.S. 901 (1969).

The District Court's decision seriously errs in holding that the *non-verbal* acts and conduct proscribed by the State regulations are within the protection of the First and Fourteenth Amendments.

II. Assuming That the Non-Verbal Acts and Conduct Involved in the Instant State Regulations Initially Have First Amendment Protection, a Federal Court May Not Require a State to Restrict Itself to Obscenity as the Only Basis for Regulation of such Non-Verbal Conduct. A State May Regulate and Limit First Amendment Activity on Non-Obscenity Grounds so Long as the State's Regulations Meet the Criteria Set Down by This Court in United States v. O'Brien, 391 U.S. 367, 376-377 (1968).

Even *if* the non-verbal acts and conduct involved in the instant regulations have a "speech" or "expression" element entitling them initially to First and Fourteenth Amendment protection, or even *if* they are found to be inseparably woven into other non-proscribed activities having First and Fourteenth Amendment protection, the regulations are nonetheless valid as they embody important state interests which clearly outweigh any incidental limitation on such non-verbal, commercial conduct.

The District Court majority has taken the position that such non-verbal acts and conduct may be regulated by the State *only* if they are *obscene,* and that the regulations are therefore invalid because they do not concern themselves with *obscenity* and do not require the standards of proof as to *obscenity.* (Appendix A)

Such a posture by the District Court is clearly erroneous. *Obscenity* is not the only basis upon which a State may regulate or limit First Amendment activity. *Hughes v. Superior Court of California,* 339 U.S. 460 (1950) and *International Brotherhood of Teamsters v. Hanke,* 339 U.S. 470 (1950) (picketing); *Beauharnis v. Illinois,* 343 U.S. 250 (1952) (libel); *United States v. Harris,* 347 U.S. 612 (1954) (lobbying); *Breard v. Alexandria,* 341 U.S. 622 (1951) (door-to-door soliciting); *Kovacs v. Cooper,* 336 U.S. 77 (1949) (sound trucks); *United States v. O'Brien,* 391 U.S. 367 (1968) (draft card burning); and see *Adderley v. Florida,* 385 U.S. 39, 47-48 (1966), and *Purity Extract Co. v. Lynch,* 226 U.S. 192, 201 (1912).

The District Court majority relies on *Roth v. United States,* 354 U.S. 476 (1957), and its progeny. But *Roth* was a criminal *obscenity* case which established that *obscenity* is not afforded First Amendment protection. *Roth* and the subsequent decisions of this Court relating thereto, have dealt with what standards of proof are to be used in determining or establishing *obscenity.* The instant State regulations however do not deal with *obscenity.* In the instant regulations, the State is not attempting to proscribe the acts and conduct because they are *obscene* and therefore contrary to the public welfare and morals, but because of other important and substantial state interests which are injured when such acts and conduct are permitted on premises wherein the public are consuming alcoholic beverages.

This Court clearly set forth in *United States v. O'Brien,* 391 U.S. 367, 376-377 (1968) that:

> ". . . This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

The State regulations invalidated and enjoined by the District Court clearly meet all of the *O'Brien* criteria.

Both traditionally and under the Twenty-first Amendment, a state has broad power to regulate and control the conditions surrounding the sale, use, distribution and consumption of alcoholic beverages within its borders. *United States Constitution, Twenty-first Amendment; Seagram v. Hostetter,* 384 U.S. 35, 41-43 (1966) *Hostetter v. Idlewild Liquor Corp.,* 377 U.S. 324, 330 (1964); *California v. Washington,* 358 U.S. 64 (1958); *Wisconsin v. Constantineau,* 400 U.S. 433, 436 (1971); *Crowley v. Christensen,* 137 U.S. 86, 91 (1890). This Court has recently *refused* to review California alcoholic beverage control disciplinary cases where the alcoholic beverages licenses have attempted to raise First Amendment contentions in connection with *non-verbal* sexual conduct or displays on state licensed alcoholic beverages premises. *Meacham dba "Barbary Coast" v. California Department of Alcoholic Beverage Control,* 393 U.S. 855 (1968); *Probro, Inc. v. Department of Alcoholic Beverage Control of California,* 392 U.S. 855 (1968); *Keller v. California Department of Alcoholic Beverage Control,* 400 U.S. 806 (1970); and see *Derrington v. City of Portland,* (Ore.) 451 P.2d 111, certiorari denied 396 U.S. 901 (1969).

The instant regulations further important and substantial state interests in preventing a state alcoholic beverages licensee from permitting certain non-verbal acts and conduct on state licensed alcoholic beverages premises when such acts and conduct in conjunction with patrons consuming alcoholic beverages is attended by, and results in, injurious acts to public welfare and morals. As the record before the Department at the time it enacted the regulations, and which is presently on file with the District Court, contains 703 pages of legislative hearing transcript and over 67 lengthy exhibits, appellants did not request its certification to this Court at this time. Attached hereto as Appendix E

is a limited summary of the some of the public welfare and morals factors shown by the record.

The State's interests are unrelated to the suppression of free expression and the regulations are no greater than essential to the furtherance of the State's interests. The regulations proscribe certain non-verbal acts and conduct on licensed on-sale alcoholic beverages premises. The regulations do not suppress speech, dancing, motion pictures or other forms of entertainment.

III. A Federal Court May Not Invalidate and Enjoin Otherwise Valid State Regulations by Assuming That Improper Motives Prompted Such Enactments.

Selecting limited excerpts from various statements in the legislative hearing record, the majority of the District Court *assume* that the motive behind the enactment of the regulations was not to deter the consequences set forth by the Department but rather to circumvent *obscenity* proof requirements. (Appendix A)

Reliance on such a basis for invalidation of State regulations is contra to the well established rule that the courts may not defeat otherwise valid enactments by assuming that improper motives prompted such enactments. *United States v. O'Brien,* 391 U.S. 367, 383 (1968); *Palmer v. Thompson,* ..... U.S. ....., 39 L.W. 4759, 4761 (Oct. Term 1970, June 14, 1970); *Barenblatt v. United States,* 360 U.S. 109, 132 (1959).

CONCLUSION

The District Court majority decision erroneously expands First and Fourteenth Amendment protection to certain non-verbal sexual acts and conduct on the basis that they purportedly are "dancing" or "entertainment" and therefore within the sphere of the First Amendment.

The District Court majority decision misapprehends

prior First Amendment decisions of this Honorable Court dealing with *obscenity*, with the result that the District Court's decision would limit and restrict a state's possible regulatory power over First Amendment activities to *only* that conduct which is *obscene*. Such a decision is clearly contra to *United States v. O'Brien* and the other First Amendment decisions of this Court cited herein.

It is submitted that the District Court majority has erred, that the questions presented by this appeal are substantial, that they are of great nationwide, public importance, and that they deal with extremely important California state policy within the area of state alcoholic beverage control. It is urged that probable jurisdiction be noted.

Dated: June 30, 1971

Respectfully submitted,

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(Appendices Follow)

Appendix A

In the United States District Court
Central District of California

Filed—April 7, 1971

ROBERT LARUE, etc., et al., *Plaintiffs* v. STATE OF CALIFORNIA, et al., *Defendants*	Civil No. 70-1751-F
DON MACLEAN, etc., et al., *Plaintiffs* v. THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, etc., *Defendants*	Civil No. 70-1770-F
JERRY D. JENNINGS, etc., et al., *Plaintiffs* v. EDWARD J. KIRBY, etc., et al., *Defendants*	Civil No. 70-1782-F

MEMORANDUM OPINION

Before: Hon. Walter Ely, Circuit Judge,
Hon. William P. Gray, District Judge, and
Hon. Warren J. Ferguson, District Judge.

FERGUSON, District Judge:

In 1967, the California Supreme Court, in an obscenity case, declared:

> "The United States Supreme Court has wisely recognized that ultimately the public taste must determine that which is offensive to it and that which is not; a public taste that is sophisticated and mature will reject the offensive and the dull; it will in its own good sense

> discard the tawdry, and once having done so, the tawdry will disappear because its production and distribution will not be profitable. Understandably, such maturity does not come quickly or easily, and, in a time when the strictures of Victorianism have been replaced by wide swings of extremism, it seems hopelessly remote." *People v. Noroff*, 67 Cal. 2d 791, 796-97 (1967).

After that statement by California's highest court, it is somewhat surprising that a federal district court four years later is called upon to determine whether a state administrative agency may require "fig leaves" to be worn by entertainers in California.

These three actions are brought pursuant to 28 U.S.C. §§ 1331, 1343, 2201 and 2202, and 42 U.S.C. § 1983, by various holders of California liquor licenses and dancers at licensed premises. A three-judge court was convened in accordance with 28 U.S.C. §§ 2281 and 2284. The actions seek to enjoin the enforcement of certain statewide rules adopted by the Department of Alcoholic Beverage Control and Edward J. Kirby, its director. The parties, by pre-trial stipulations and orders, have acknowledged proper jurisdiction and venue in this court.

Rules in Issue

The Department is established pursuant to Article 20, Section 22 of the California Constitution. That section provides in part:

> "The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the

granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude."

That paragraph of the state constitution has been interpreted to reject the contention of the Department that its power over denial, suspension and revocation of liquor licenses is limitless and absolute. It was held that the Department's power over such matters is subject to reasonable legislative enactment. *Kirby v. Alcoholic Beverage Control Appeals Board,* 71 Cal. 2d 1200 (1969); *Samson Market Co. v. Alcoholic Beverage Control Appeals Board,* 71 Cal. 2d 1215 (1969); *Big Boy Liquors, Ltd. v. Alcoholic Beverage Control Appeals Board,* 71 Cal. 2d 1226 (1969).

The Department adopted Rules 143.2, 143.3, 143.4 and 143.5, effective August 10, 1970. The Rules, which are set forth in Appendix A, state generally that certain entertainment on premises licensed by the Department is contrary to public welfare and morals and no liquor license may be held at any establishment where such entertainment is permitted. In summary, they provide:

(1) 143.2 — prohibits topless waitresses.
(2) 143.3 —
    (a) prohibits nude entertainers;
    (b) regulates the content of entertainment;
    (c) requires that certain entertainers perform on a stage.
(3) 143.4 — regulates the content of movies.
(4) 143.5 — prohibits any entertainment which violates a city or county ordinance.

The plaintiffs originally challenged all four Rules. However, at oral argument they withdrew their objections in these actions to the Rules which (1) prohibit topless waitresses, (2) permit local regulations, and (3) require certain entertainers to be on a stage. The plaintiffs thus concede

that topless waitresses are not within the protection of the First Amendment; that local ordinances must be independently challenged depending upon their content; and that the requirement that certain entertainers must dance on a stage is not invalid.

The court is, therefore, required to determine (1) whether Rule 143.4, which regulates the content of movies, is unconstitutional, and (2) whether those portions of Rule 143.3 which regulate the content of live entertainment are prohibited by the First, Fifth and Fourteenth Amendments.

Doctrine of Abstention

Prior to the determination of the merits of the litigation, it must be determined whether this court should stay its hand pending state court determination. In *Wisconsin v. Constantineau*, 39 U.S.L.W. 4128 (Jan. 19, 1971), the Supreme Court invalidated a state law relating to liquor matters due to constitutional infirmities. Under ordinary circumstances, this court might have adopted the reasoning of Mr. Justice Black in his dissenting opinion, when he stated: "I believe it is unfair to Wisconsin to permit its courts to be denied the opportunity of confining this law within its proper limits if it could be shown that there are other state law provisions that could provide such boundaries." 39 U.S.L.W. at 4131.

However, certain of the plaintiffs in this action have been to state court on many occasions to challenge the Rules, but the state courts have refused to assume jurisdiction over their complaints. The California Attorney General has requested the state courts to assume jurisdiction over the litigation presented here, but, rejecting that request, the state courts have refused. The Attorney General, furthermore, has asked that this court not abstain but decide the merits of the litigation.

It, therefore, appears that the doctrine of abstention should not be applied, and this court has the obligation to decide another state obscenity case before the state courts have ruled.[1] However, in order to place the litigation in proper focus, a discussion of the obscenity laws as pronounced by the California Supreme Court, as well as the United States Supreme Court, is necessary.

Background

In 1965, a dancer in a California nightclub danced with her breasts exposed. The California Supreme Court, in *In re Giannini*, 69 Cal. 2d 563 (1968), held that she could not be convicted of either lewd conduct or indecent exposure in the absence of proof that her dance was obscene. The court stated:

> "Nor can we accept the prosecution's sweeping argument that 'standards required of an obscenity prosecution are inapplicable in this case' because the 'conduct standing alone is clearly unlawful' and does not become lawful 'because it is engaged in during an activity' which would be afforded First and Fourteenth Amendment protections. Petitioner's apparent 'unlawful conduct' consisted of the baring of her breasts; the thrust of the argument presumably is that since such conduct could not be lawfully engaged in at any place and any time and under any and all circumstances it is not entitled to constitutional protection when performed in the different context of a theatrical performance.

1. With all due respect to Judge Gray, his dissenting opinion warrants the reemphasis of two significant points. First, all parties involved agree that the California courts have refused to consider the significant constitutional questions which confront us. Second, all of the parties insist that this court *should* resolve these issues. The majority's respect for the California courts is no less than that entertained by Judge Gray, but when the California courts refuse to decide the issues, and when those issues are presented to us under orderly procedures authorized by law, we cannot abdicate our constitutional responsibility until some indefinite time which may never arrive.

"The conduct here of course took place during a theatrical performance of a dance before an audience. We have previously explained that such a dance enjoys constitutional protection. The proper issue here therefore turns on whether the alleged unlawful conduct, which is inextricably a part of the dance, forfeits constitutional protection because of its alleged obscene nature.

"To isolate the questioned conduct and to judge it in an entirely different context would be to distort the nature of this case. By fictitiously changing the manner and place of its performance the prosecution would make the conduct criminal although in the actual manner and place of its performance the conduct should be tested by constitutional standards.

"Thus acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene. Respondent's contention would automatically reject the application of the law of obscenity to the instant case. It would adjudicate Iser's conduct as if it were not performed on the stage, not a dance, and not incorporated in a form of communication. Yet the entire point of the case is that the conduct occurred in that very context."

Then, in 1968, Robert G. Barrows produced a one-act play in Hollywood, named "The Beard". The play ended with a simulated sex act, and the producer and actors were arrested for violating California Penal Code Sections involving disorderly conduct and obscenity. The California Supreme Court, in *Barrows v. Municipal Court,* 1 Cal. 3d 821 (1970), held that the disorderly conduct statute did not pertain to theatrical performers, and that the then existing California obscenity laws did not encompass live perform-

ances as distinguished from books, film and pictures. It was not until November of 1970 that the legislature enacted Section 311(g) of the California Penal Code, which for the first time placed live entertainment within the ambit of the obscenity statutes.

It may be asserted that parts of the Rules are invalid because they do not conform to the obscenity statutes enacted by the California Legislature in light of the trilogy interpreting the relationship between the legislature and the Department (*Kirby, Samson Market Co.* and *Big Boy Liquors, Inc., supra*). However, that issue is one which does not involve the Federal Constitution and, therefore, is not before this court.

In the meantime, law enforcement agencies were upset with the decisions of the United States and California Supreme Courts in the field of obscenity. In May of 1970, the Department of Alcoholic Beverage Control began hearings on the Rules which are the subject of this litigation. Law enforcement agencies, counsel and owners of licensed premises and investigators for the Department testified. The story that unfolded was a sordid one, primarily relating to sexual conduct between dancers and customers. It is obvious, after reading the transcripts, that this is why the Department adopted the Rule which requires certain entertainers to perform on a stage at least six feet away from any customer. It is also obvious why the plaintiffs have abandoned their objection to that Rule. No reasonable person could claim that entertainers and customers have a constitutional right to engage in such conduct in a cocktail lounge.

However, a fair reading of the transcripts of the hearings requires the conclusion that the Department not only desired to prohibit sexual conduct between dancers and customers, but wanted to establish a set of rules which

would circumvent United States and California Supreme Court decisions relating to obscenity. Excerpts from the transcripts are contained in Appendix B. It must be stated initially, that displeasure by law enforcement agencies and state administrative agencies with court decisions interpreting the scope of the First Amendment cannot provide the basis for those agencies to adopt rules against entertainment which is protected by those decisions.

The Issue of Obscenity Regarding Movies

Rule 143.4 prohibits the showing of film, still pictures or other visual reproduction of certain portions of the body and conduct without regard to whether such visual portrayal is obscene.

One must be careful not to permit one's analysis of a theatrical performance to be clouded by his view of the same conduct in a nontheatrical context. The state may certainly regulate both, but the constitutional standards that must be applied to each are quite different. While both fall within the police power of the state, theatrical performances, as well as books, pictures and films, are within the protection of the First Amendment unless they are obscene.

In *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952), the Court specifically held that motion pictures are within the free speech and free press guaranties of the First and Fourteenth Amendments. More recently, the Court of Appeals for the Ninth Circuit held, in *Pinkus v. Pitchess,* 429 F.2d 416 (9th Cir. 1970), *aff'd sub nom. California v. Pinkus,* 39 U.S.L.W. 3223 (November 23, 1970), that a "stag" movie of a woman who disrobed and feigned some type of sexual satisfaction from self-induced acts is not obscene.

The State of California may, of course, prohibit obscene movies. That is not the issue here. The issue is whether or

not the state may regulate the content of movies by prohibiting those which depict certain conduct, or exposure of portions of the body, without the requirement that the movies be factually and legally determined to be obscene under the standards required by the Supreme Court.

A summary of the obscenity laws is provided in *Roth v. United States,* 354 U.S. 476, 488-89 (1957):

> "The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina v. Hicklin,* [1868] L. R. 3 Q.B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." (Footnotes omitted.)

In *Memoirs v. Massachusetts,* 383 U.S. 413, 418 (1966), the Court held:

> "Under this definition [of obscenity], as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

It is clear from these cases that isolated portions of a movie cannot be extracted out of the context of the whole.

To do so has been uniformly condemned by the Supreme Court. Yet this is exactly what the Department's regulation does. Moreover, it fails to consider any possible redeeming social value of the material taken as a whole and in no way takes contemporary community standards into consideration.

In regard to the social value requirements, the Court, in *Stanley v. Georgia,* 394 U.S. 557, 566 (1969), stated:

> "Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this court to draw, if indeed such a line can be drawn at all."

Assuming that under the California Constitution the Department has the power to prohibit the showing of obscene movies in licensed premises, it may not use a test which was specifically rejected 14 years ago by the Supreme Court.

The Issue of Obscenity Regarding Live Entertainment

Rule 143.3 regulates live entertainment and prohibits certain conduct and exposure. As stated previously, it is well settled that theatrical entertainment falls within the protection of the free speech-free press provisions of the First Amendment, made applicable to the states through the Fourteenth Amendment. *See, e.g., Jacobellis v. Ohio,* 378 U.S. 184 (1964); *Kingsley Pictures Corp. v. Regents,* 360 U.S. 684 (1959). In *In re Giannini,* 69 Cal. 2d 563, 567-68 (1968), the California Supreme Court stated:

> "Although the United States Supreme Court has not ruled on the precise question whether the performance of a dance is potentially a form of communication protected against state intrusion by the guarantees of the First and Fourteenth Amendments to the federal Constitution, the very definition of dance describes it as

> an expression of emotions or ideas. . . . The dance is perhaps the earliest and most spontaneous mode of expressing emotion and dramatic feeling; it exists in a great variety of forms and is among some people connected with religious belief and practice, as among the Mohammedans and Hindus."

In that case, *and Barrows, supra,* the California Supreme Court held that dancing and live theatrical performances are within the First Amendment.

> "[T]he performance of the dance indubitably represents a medium of protected expression. To take but one example, the ballet obviously typifies a form of entertainment and expression that involves communication of ideas, impressions, and feelings. Similarly, Iser's dancing, however vulgar and tawdry in content, might well involve communication to her audience." 69 Cal. 2d at 570.

It is of no significance that expression which is protected by the First Amendment takes place in a commercial setting. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963); *Smith v. California,* 361 U.S. 147 (1959). Nor does it lose its protection due to the fact that it is presented in an unusual manner. In *Schacht v. United States,* 398 U.S. 58 (1970), Justice Black stated that a performance is a theatrical one even though it is not performed in a conventional way in a conventional place. There, a mime troop performed outside an induction station, and the Supreme Court held that its members were acting in a theatrical production. The Court stated that "theatrical productions need not always be performed in buildings or even on a defined area such as a conventional stage. Nor need they be performed by professional actors or be heavily financed or elaborately produced." 398 U.S. at 61.

Nevertheless, the Department contends that live entertainment is not speech within the protection of the First Amendment, and relies on *United States v. O'Brien,* 391 U.S. 367 (1968). In *O'Brien,* the Court affirmed a conviction for burning a draft card in spite of the assertion by the defendant that his action was symbolic speech. However, *O'Brien* involved destruction of a selective service registration certificate. We are not dealing with violence or destruction when the subject is nothing more than the theatrical performance of dancing.

The Court, in *O'Brien,* set forth four individual tests which a regulation in this area must meet: (1) it must be within the constitutional power of the governmental agency; (2) it must further an important or substantial governmental interest; (3) the governmental interest must be unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of that interest.

It seems clear that the regulations in question here do not meet the requirements of *O'Brien.* In light of the pretrial stipulation, it is uncontested that none of the legitimate state interests summarized in *Redrup v. New York,* 386 U.S. 767 (1967), in the field of obscenity are involved in the present case. Minors are not allowed to view the entertainment. There is no "pandering" and the entertainment is presented in such a way that it is not forced upon unwilling individuals.

Moreover, the governmental interest which the Department seems to assert is directly related to the suppression of what may very well be non-obscene free expression. The resulting restriction on First Amendment freedoms is con-

siderably greater than is essential to the furtherance of any legitimate state interest since the Department could, as has been done by the California Legislature, limit its prohibition to obscene entertainment.

The Rule, as it pertains to dancing, runs afoul of the *Roth* decision, as does the Rule pertaining to movies. While both may be prohibited if they are obscene, neither may be prohibited unless the constitutional test of obscenity is met. One isolated act may not be taken out of context from the whole, and to be considered obscene the whole must meet the three-pronged test set forth in *Memoirs v. Massachusetts,* 383 U.S. 413 (1966).

Of course, sexual conduct between a dancer and a customer could hardly be termed a theatrical performance which is protected by the First Amendment. Hopefully, the stage requirement set forth in Rule 143.3 will have the desired effect of prohibiting such conduct.

Public Welfare and Morals

It is evident from a study of the transcripts of the public hearings that the Department enacted the Rules in an attempt to circumvent the obscenity laws, as well as to prohibit contact between dancers and customers.

The Department claims the Rules further a substantial governmental interest, such as protection of the public welfare and morals from B-girls, prostitution, narcotics and the protection of minors. The Department asserts that those problems are increased when alcohol and possible sexual stimulation are present within the same premises. Narcotic and prostitution violations may of course be prosecuted under criminal statutes, but certainly cannot be used as a vehicle to impose censorship without complying with the law on obscenity.

The pre-trial order stipulates that it is not disputed that the plaintiffs prohibit the attendance of minors in their establishments, and that they cause the premises and customers to be policed to insure the nonentrance of minors. The pre-trial order sets forth the further undisputed facts (1) that the dancing cannot be viewed from outside the premises, (2) that persons are warned at the entrances of the type of entertainment that is conducted, and (3) that there is no pandering. It is, therefore, clear that none of the legitimate state interests summarized in *Redrup v. New York,* 386 U.S. 767, 769 (1967), are involved in the present action.

Theatrical entertainment may not be prohibited without a constitutional obscenity test because the state deems it necessary to protect the public welfare and morals. That decision was made by the Supreme Court in *Stanley v. Georgia, supra:*

> "And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. . . .
>
> "Perhaps recognizing this, Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion. But more importantly, if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents

ordinarily to be applied to prevent crime are education and punishment for violations of the law. . . .' *Whitney v. California,* 274 U.S. 357, 378 (1927) (Brandeis, J., concurring). See Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 938 (1963)." 394 U.S. at 565-67. (Footnotes omitted.)

In *Carroll v. Princess Anne,* 393 U.S. 175 (1968), despite the fact that the case involved the threat of violence, the Court held that while sanctions against the plaintiffs may take the form of criminal prosecutions for the violation of valid laws, they may not take the form of prior censorship, absent a showing in an adversary proceeding of a clear and present danger.

Justice Mosk of the California Supreme Court, in *Burton v. Municipal Court,* 68 Cal. 2d 684, 696 (1968), succinctly answered the issue when he stated, "It is clear that where First Amendment rights are concerned the statute itself and not the evidence in an individual case establishes the boundaries of permissible conduct. . . ."

A state is not free to adopt whatever procedures it pleases for dealing with obscenity. *Marcus v. Search Warrant,* 367 U.S. 717, 731 (1961). Dancing has always presented a problem to those who see it as representing perils of pagan memories. The First Amendment, however, directs that concepts of public welfare and morality may not prohibit a dance no matter how immoral it may appear to be, unless it violates an obscenity statute that meets the test of *Roth.* Clearly the Rules as they pertain to entertainment do not meet that test and were, in fact, designed to circumvent it.

The Twenty-First Amendment Argument

Section 2 of the Twenty-First Amendment provides that:

"Sec. 2. The transportation or importation into any State, Territory, or possession of the United

States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

In *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970), Mr. Justice Douglas held that in regard to liquor regulations the government has an unquestioned right to enact legislation to assure that the taxing power of the government over the liquor industry is effective. In *Wisconsin v. Constantineau,* 39 U.S.L.W. 4128 (January 19, 1971), he stated that the police power of the states over intoxicating liquors was extremely broad even prior to the Twenty-First Amendment, citing *Crane v. Campbell,* 245 U.S. 304 (1917). Yet it was stated by all Justices, including those who dissented on the doctrine of abstention, that the interest of a state in regulating the liquor business cannot override the Due Process Clause of the Fourteenth Amendment. If it cannot override that clause, it certainly cannot override the First Amendment, which has always received a "preferred position" among the liberties granted to all of us. *Thomas v. Collins,* 323 U.S. 516, 529-30 (1945).

All of the cases cited to the court by the Department interpreting the Twenty-First Amendment involved the inter-relationship of that Amendment with the commerce clause and the import-export clause of the Constitution. It is clear that other clauses in the Constitution may not be used to restrict obscenity without complying with the standards established by the Supreme Court. *See Blount v. Rizzi,* 39 U.S.L.W. 4120 (January 14, 1971).

While it is true that one does not have an absolute right to receive a liquor license, it is equally true that the state cannot place an unconstitutional precondition on the possession of those licenses. As the Supreme Court noted in *Sherbert v. Vernon,* 374 U.S. 398 (1963): "It is too late in

the day to doubt that the liberties of . . . expression may be infringed by the denial of or placing conditions upon a benefit or privilege." The fact that no direct restraint or punishment is imposed upon the exercise of speech does not determine the free speech question. Indirect "discouragements" undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines or injunctions. *American Communications Assn. v. Douds,* 339 U.S. 382, 402 (1950). Thus, a state agency cannot exercise its constitutional power to issue, renew or revoke liquor licenses for the purpose of censoring whatever it believes to be undesirable entertainment. To allow this would allow states to circumvent the protection provided by the First Amendment and do indirectly that which they cannot do directly.

Obscenity Must Be Determined by the Courts

The Supreme Court, in explicit terms, has stated that the issue of obscenity must be determined by the courts and not merely by an administrative agency, no matter how well meaning it is.

In *Freedman v. Maryland,* 380 U.S. 51 (1965), the Court held that any system of censorship must contain, at the minimum, the following procedural safeguards if it is not to contravene the First and Fifth Amendments: (a) any restraint prior to judicial determination must be imposed only briefly; (b) the censor must go to court in a specified brief period; and (c) the safeguards must be contained in the statute itself or be supplied by judicial rule.

In *Blount v. Rizzi, supra,* the Court strengthened the requirement that even in noncriminal cases only the courts have the constitutional authority to determine obscenity, and that judicial review must be a swift one. There the Court

cited *Freedman v. Maryland, supra:* "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U.S. at 58.

The Rules adopted by the Department of Alcoholic Beverage Control are totally void of any requirement that the Department seek any judicial review of obscenity. The very limited judicial involvement is set forth in California Business and Professions Code § 23090, which provides that:

> "Any person affected by a final order of the [Alcoholic Beverage Control Appeals Board], . . . may, . . . apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of such final order."

In fact, as set forth previously, the Rules were designed to circumvent court decisions dealing with obscenity and to eliminate judicial determinations. That is constitutionally impermissible.

The procedure set forth by the Rules and the California Business and Professions Code requires the licensee to challenge the decision of the Department to suppress obscenity. This method was condemned in *Blount v. Rizzi, supra,* "the scheme has no statutory provision requiring governmentally initiated judicial participation in the procedure . . ., or even any procedure assuring prompt judicial review". 39 U.S.L.W. at 4122. Judicial review of the decisions of the Department is limited to appellate review (California Business and Professions Code §§ 23090-23090.7), which does not meet the standard required by *Freedman v. Maryland, supra,* and *Blount v. Rizzi, supra.*

Summary

In summary, we hold that the Rules of the Department as written, which prohibit the content of movies and live entertainment, are void for the reason that they do not conform to the tests established by the United States Supreme Court. The other parts of the Rules, namely, those that regulate (a) the attire of waitresses; (b) the conduct between performers and customers; (c) the place where certain entertainers must perform; and (d) the adoption of local regulations provided they comport with the United States Constitution are not challenged.

Pursuant to the provisions of Rule 52 of the Federal Rules of Civil Procedure, this opinion shall constitute the findings of fact and conclusions of law of the court.

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, a judgment shall be entered in each of the three cases in favor of the plaintiffs and against the defendants as follows:

"1. Rule 143.4—*Visual Displays*—is adjudged to be in violation of the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and the defendants are enjoined from enforcing the same.

"2. Rule 143.3—*Entertainers and Conduct*—is adjudged to be in violation of the First, Fifth and Fourteenth Amendments, as it pertains to live entertainment, and the defendants are enjoined from enforcing the same. This injunction does not pertain to any sexual conduct between an entertainer and a customer.

"3. Each party shall bear its own costs.

"4. The court retains jurisdiction to enforce the provisions of this judgment, for the purpose of issuing orders to clarify, modify or amend any of the provisions hereof, and for all other purposes."

Dated this 6th day of April, 1971.

/s/ WALTER ELY
United States Circuit Judge
/s/ WARREN J. FERGUSON
United States District Judge

APPENDIX A

"143.2 *Attire and Conduct.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:

"(1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.

"(2) To employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.

"(3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

"(4) To permit any employee or person to wear or use any device or covering exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

"If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

"143.3. *Entertainers and Conduct.* Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale

license shall be held at any premises where such conduct or acts are permitted.

"Live entertainment is permitted on any licensed premises, except that:

"(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

"(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six-feet from the nearest patron.

"No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

"No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

"If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision of application, and to this end the provisions of this rule are severable.

"143.4. *Visual Displays.* The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

"The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

"(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

"(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

"(3) Scenes wherein a person displays the vulva or the anus or the genitals.

"(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

"If any provision of this rule or the application thereof to any person or circumstances is held invalid such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

"143.5. *Ordinances.* Notwithstanding any of the provisions of Rules 143.2, 143.3 and 143.4, no on-sale licensee shall employ, use the services of, or permit upon his licensed premises, any entertainment or person so attired as to be in violation of any city or county ordinance."

APPENDIX B

I

Partial Testimony of Captain Robert Devin of the Los Angeles Police Department

"CAPT. ROBERT A. DEVIN: Mr. Chairman, I'd like to introduce myself. I'm Capt. Robert Devin, commander of the administrative vice division of the Los Angeles Police Department. I have been a member of the police department in the City of Los Angeles for the past twenty-one and a half years. I have been assigned in my current assignment as the commander of the administrative vice division for the past one and a half years. Part of my responsibilities are the coordination, the review of the problem of pornography and obscenity throughout the City of Los Angeles. And in that capacity, I have formed some opinions. I believe I have documented the position that I am about to state to the group, and I'd like to share this information with the rules committee this morning.

"The Los Angeles Police Department supports all three of the rules changes that are proposed. We feel that there is a need for a measure of regulation in the field of live entertainment—rather, the field of nudity as pertains to live entertainment. Coincidentally, the City of Los Angeles is embarked at this time on a revised Cafe Entertainment Ordinance for the City of Los Angeles, that has been prompted primarily through recent court decisions. The Barrows Case of January 30th, 1970, has compelled us to re-examine our cafe entertainment permit ordinance, and this is in the process of revision. As a matter of fact, its going to be acted upon by our police commission tomorrow afternoon.

"The main position that we're taking as regards the subject of nudity in locations that are licensed by the Department of Alcoholic Beverage Control, is that there is a compelling need for a separation of the entertainer from the non-entertainer. And this position is based on experience that we have had in the past one and a half years, during which time we've seen the advent and the growth of nude entertainment in our city bars.

"The former novelty of a topless female performer has now been replaced by the bottomless performer. Our first experience, our first knowledge that locations of this type were in existence in Los Angeles occurred approximately in February of 1969. In our opinion, this arose because of a California State Supreme Court decision that followed a prior federal rules, of the stated two important items. No. 1, it gave recognition to the dance as a form of expression, as a form of communication between the performer and the audience, and stated, in effect, that the dance is constitutionally protected under the first amendment. And in the absence of a showing of obscenity, that a dance was constitutionally protected. And secondarily, it imposed, as part of the showing by the people, the necessity for a new contemporary community standard, and that standard would declare to be the standard of the State of California.

"While statutory law has been available to us to regulate what was formerly considered as antisocial behavior, the federal and state judicial system has, through a series of similar decisions, effectively emasculated law enforcement in its effort to contain and to control the growth of pornography, and of obscenity and of behavior that is associated with this kind of performance."

II

Partial Testimony of Roy E. June, City Attorney of the City of Costa Mesa

"MR. ROY E. JUNE: Good morning, gentlemen. My name is Roy E. June, and I am the City Attorney for the City of Costa Mesa, and I am here by direction of the City Council of the City of Costa Mesa to support the director in your promulgation of rules and regulations relating to topless and bottomless entertainment.

"The vigilant and reasonable attention to these establishments by the Costa Mesa Police Department has further served to place these activities in their proper perspective. The courts, however, have not been as generous. Section 647(a) of the Penal Code, lewd and dissolute conduct, is no longer available to the prosecution. We can use it under some circumstances, but not as extensively as we could in 1967.

"Portions of Section 615½ of the Penal Code, on indecent exposure, is not as available to the prosecution as it was in the year 1967. There have been inroads on these cases.

"Regulation of live entertainment, unless so broad to be cumbersome and unworkable, is no longer available to the prosecution. It remains, I think, for the Alcoholic Beverage Control Board to effectively regulate bottomless and topless dancers, and pornographic films displayed in these establishments."

III

Partial Testimony of Richard C. Hirsch of the office of the Los Angeles County District Attorney

"In 1969, the Los Angeles County District Attorney's office filed approximately 781 cases involving bottomless dancing. And almost all of these cases involved perform-

ances which were conducted on premises licensed by the Department of Alcoholic Beverage Control. They are almost all bar-type establishments. As of January 1st, 1970, there were approximately 134 convictions under Penal Code statutes. Now, we have to consider what a conviction means in terms of the criminal law. Most of the cases filed were either under Penal Code Section 647(a) as it then applied, or Section 314.1 of the Penal Code. These are the lewd and indecent exposure statutes. Most of the dances involved totally nude dancing or bottomless-type dancing. There were a few dances, some of which I personally prosecuted which involved topless-type dancing in which the dancer would wear a bikini-type bottom and then be exposed from the waist up without any sort of covering. To convict under the statutes under which these cases were filed, it had to be proven that the dance was obscene, and it had to be proven that such a dance was obscene beyond a reasonable doubt. As you no doubt know, the lewd conduct and indecent exposure statutes use words such as 'lewd,' 'lewdly,' 'dissolute,' but these words have been held to be synonymous with obscene. Therefore, to prove that there was a violation of the criminal law, we had to prove that the three elements of obscenity were established, and prove that these elements were established beyond a reasonable doubt, each to a reasonable doubt, and beyond a moral certainty. The three elements of obscenity are, number one, that the dances were substantially beyond customary limits of candor in the community, and the Supreme Court of the United States held in the Giannini case that the community which was relevant was the entire State of California. Secondly, it had to be shown that the predominant appeal to the dance was to the prurient interest, and that is a shameful or morbid interest in nudity, sex or excretion.

And third, it had to be shown, and beyond a reasonable doubt, each of these standards, that the dances in question were utterly without redeeming social importance. . . .

• • •

"Take an average case. Suppose we have a bottomless dance case and there is a citation issued on the dancer. And, say, the owner of the establishment who is present for aiding and abetting, that case would then be brought into the court. Generally what would happen, and this is the procedure we find in most of the defense in most of these cases, there may be a demur to the statute by the defense on the grounds that the statute on its fact is unconstitutional. We have to send a deputy into court to prosecute that demurrer. Then, generally, the defense requests a pretrial hearing. And the pretrial hearing is, in effect, a separate trial. It's a full-blown trial in which ordinarily expert testimony is taken on the part of the defense and the prosecution to establish whether or not the material, the dance in question is constitutionally protected. At that time, the judge rules on whether or not it's constitutionally protected. If he rules it is not constitutionally protected, it has been the practice for the case to go up on a writ, prohibition or mandate at that time to the appellate department of the Superior Court. At that time, we have an appellate deputy who would represent our office in the appellate department on that case. Then the case will more often than not come back to the trial court. At that time, we will engage in a full trial, either court or jury trial, which may last anywhere from a few days to a week or more. And, of course, this involves a deputy being tied up in the court for this entire period of time. So, there is, on each case, the possibility of a great deal of time being expended by trial deputies in these proceedings.

"MR. SEXTON: Well, I was interested in the—or concerned about the public welfare in asking that, wondering

how much it might cost the taxpayer to have to devote this amount of man-power to this type of entertainment.

"MR. HIRSCH: I don't have any specific totals for you, but I would assume that there are totals available as to what the cost of a jury trial is in a criminal case per day, and you can figure that out in the number of days that these cases would take. And I think it would be quite a considerable amount of money, plus the fact that expert witnesses must be generally paid. They are usually professional witnesses, psychiatrists in many parts, in many cases psychologists, individuals from the arts and theater who come in and expect to receive some sort of compensation for their time in court. These fees will vary in amount, but, of course, there is that expense also, in that they are first amendment cases that need that type of testimony."

(Addendum to Judge Ferguson's opinion in
LaRue, et al. v. State of California
(Nos. 70-1751-F, 70-1770-F and 70-1782-F))

GRAY, District Judge, dissenting:

It seems to me that this is a case in which our court should abstain until the courts of California have had an opportunity to consider the constitutional issues here concerned. This conclusion is reinforced by the decisions of the Supreme Court in *Younger v. Harris*, 39 U.S.L.W. 4201 (February 23, 1971) and its five companion cases[1] that were all decided on the same day, and which came after *Wisconsin v. Constantineau*, 39 U.S.L.W. 4128 (January 19, 1971), upon which the majority opinion here relies. It is true that *Younger* and its companion cases were concerned with whether a United States District Court should

1. *Boyle v. Landry*, 39 U.S.L.W. 4207 (February 23, 1971); *Samuels v. Mackell*, 39 U.S.L.W. 4211 (February 23, 1971); *Perez v. Ledesma*, 39 U.S.L.W. 4214 (February 23, 1971); *Dyson v. Stein*, 39 U.S.L.W. 4231 (February 23, 1971); *Byrne v. Karalexis*, 39 U.S.L.W. 4236 (February 23, 1971).

enjoin a currently pending state criminal prosecution, which is a somewhat different issue from the one here involved. However, a principal thrust of those opinions is to suggest to our three judge courts that we should give increased consideration to the concept of comity, which embodies ". . . a proper respect for state functions . . . and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris* 39 U.S.L.W. 4201, 4203 (February 23, 1971). This seems to me to be a good case in which to apply this principle.

The California courts are just as able as are we to consider whether or not the subject regulations square with the United States Constitution. They should be given the opportunity so to do, and I am by no means persuaded that this record shows them to have declined to assume such responsibility.

Now that this court has determined to rule on the merits of the case at hand, I find myself again in disagreement with the majority. The question here is not simply ". . . whether a state administrative agency may require 'fig leaves' to be worn by entertainers in California" (see majority opinion, page 2). I agree with Judge Ferguson that ". . . it is well settled that theatrical entertainment falls within the protection of the free speech-free press provisions of the First Amendment. . . ." (Majority opinion,

page 11.) However, this valid assertion of the law does not necessarily carry the day in deciding this case.

Dancing without fig leaves may very well be a form of artistic expression protected by the First Amendment. But such a right is not absolute. For example, the state, under its police power, certainly could prohibit nude dancing on the street corner or on the campus of a junior high school. It is also within the police power to prohibit *all* sales of alcoholic beverages and to impose reasonable restrictions upon the conditions under which such sales may be made.

If we acknowledge these things, I do not think that it is beyond the constitutional right of California, through its administrative agency, to say, in its wisdom or lack of wisdom, that lewd or naked dancing (even though not necessarily obscene) and the serving of alcohol do not properly mix, and that although a person may present one or the other, he may not do both at the same place and time.

As the majority opinion indicates, it is conceded that the regulations prohibiting direct personal contact between customers and naked employees are constitutionally enforceable. The opinion also suggests that this is so because such contact and what may result therefrom are offensive to public morals. At the administrative hearing from which the subject regulations stemmed, there was testimony as to some of the horrendous things that an occasional "well-oiled" patron purportedly did to the first girl that he saw, immediately upon leaving a bar after having been aroused and "inspired" by the nude dancing. We might think up logical reasons that would warrant regulations seeking to protect the public morals against on-site offenses, and ignore any subsequent danger. But I believe that nothing in the Constitution requires such a distinction.

DATED: April 2, 1971.

/s/ WILLIAM P. GRAY
William P. Gray
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Filed Apr 7 1971

ROBERT LARUE, etc., et al., *Plaintiffs* v. STATE OF CALIFORNIA, et al., *Defendants*	Civil No. 70-1751-F
DON MACLEAN, etc., et al., *Plaintiffs* v. THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, etc., *Defendants*	Civil No. 70-1770-F
JERRY D. JENNINGS, etc., et al., *Plaintiffs* v. EDWARD J. KIRBY, etc., et al., *Defendants*	Civil No. 70-1782-F

JUDGMENT

This court having this date filed a memorandum opinion signed by the Honorable Walter Ely, United States Circuit Judge and the Honorable Warren J. Ferguson, United States District Judge, the Honorable William P. Gray, United States District Judge, dissenting, which memorandum opinion constitutes the findings of fact and conclusions of law of the court, pursuant to Rule 52 of the Federal Rules of Civil Procedure,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that a judgment is granted in each of these three cases in favor of the plaintiffs and against the defendants as follows:

1. Rule 143.4—*Visual Displays*—is adjudged to be in violation of the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and the defendants are enjoined from enforcing the same.

2. Rule 143.3—*Entertainers and Conduct*—is adjudged to be in violation of the First, Fifth and Fourteenth Amendments, as it pertains to live entertainment, and the defendants are enjoined from enforcing the same. This injunction does not pertain to any sexual conduct between an entertainer and a customer.

3. Each party shall bear its own costs.

4. The court retains jurisdiction to enforce the provisions of this judgment, for the purpose of issuing orders to clarify, modify or amend any of the provisions hereof, and for all other purposes.

Dated this 6th day of April, 1971.

/s/ WALTER ELY
Walter Ely
United States Circuit Judge

/s/ WARREN J. FERGUSON
Warren J. Ferguson
United States District Judge

Appendix C

EVELLE J. YOUNGER, Attorney General
of the State of California
L. STEPHEN PORTER
Deputy Attorney General
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-2146
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
Filed—May 5 2 36 PM '71

ROBERT LARUE, et al., *Plaintiffs,* v. STATE OF CALIFORNIA, et al., *Defendants.*	Civil No. 70-1751-F
DON MACLEAN, et al., *Plaintiffs,* v. THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, et al., *Defendants.*	Civil No. 70-1770-F
JERRY D. JENNINGS, et al., *Plaintiffs,* v. EDWARD J. KIRBY, et al., *Defendants.*	Civil No. 70-1782-F

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that, pursuant to Section 1253 of Title 28 of the United States Code, the defendants hereby appeal to the Supreme Court of the United States

from the Judgment entered herein on April 7, 1971, permanently enjoining said defendants from enforcing: (1) California Department of Alcoholic Beverage Control Regulation 143.3 as it pertains to live entertainment, and (2) California Department of Alcoholic Beverage Control Regulation 143.4.

DATED: April 30, 1971.

EVELLE J. YOUNGER, Attorney
General of the State of
California

/s/ L. STEPHEN PORTER
Deputy Attorney General
Attorneys for Defendants.

STATEMENT OF SERVICE BY MAIL

I, Mercedes L. Maes, declare:

I am a citizen of the United States, over 18 years of age, and not a party to the within cause; my business address is 6000 State Building, San Francisco, Calif. 94102; I served a copy of the attached: NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES. (Civil Nos. 70-1751-F; 70-1770-F; 70-1782-F) on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Harrison W. Hertzberg, Esq.
3540 Wilshire Boulevard
Los Angeles, CA 90005

Kenneth Scholtz, Esq.
1515 Redondo Beach Boulevard
Gardena, CA 90247

Warren I. Wolfe, Esq.
Donald J. Boss, Esq.
3859 West Sixth Street
Los Angeles, California

Each said envelope was then on April 31, 1971 sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 30, 1971, at San Francisco, California.

/s/ MERCEDES L. MAES

4/67
CCP §§ 1013a (Cal.Stats. 1959 c. 345)
2015.5 (Cal.Stats. 1957, c. 1612)

Subscribed and sworn to before me this 30th day of April 1971.

/s/ THELMA N. CROW
My commission expires December 3, 1971

[Seal]

Appendix D

California Department of Alcoholic Beverage Control Regulations 143.2, 143.3, 143.4 and 143.5 (Title 4, California Administrative Code, §§ 143.2, 143.3, 143.4 and 143.5) were enacted and filed with the California Secretary of State (Register 70, No. 28) on July 9, 1970.

"143.2. Attire and Conduct. The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:

(1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast, below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.

(2) To employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.

(3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

(4) To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the

invalid provision or application, and to this end the provisions of this rule are severable.

143.3. Entertainers and Conduct. Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

Live entertainment is permitted on any licensed premises, except that:

(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

143.4. Visual Displays. The following acts or conduct on licensed premises are deemed contrary to pub-

lic welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

(3) Scenes wherein a person displays the vulva or the anus or the genitals.

(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

143.5. Ordinances. Notwithstanding any of the provisions of Rules 143.2, 143.3 and 143.4, no on-sale licensee shall employ, use the services of, or permit upon his licensed premises, any entertainment or person so attired as to be in violation of any city or county ordinance."

Appendix E

Limited summary of some of the public welfare and morals factors shown by the record below:

(1) Alcohol acts as a depressant on the control centers of the brain which normally inhibit base behaviors, thus resulting in a release from inhibitions. Hence, persons consuming alcoholic beverages may and do engage in acts and conduct which they would not engage in if not drinking. (Defendants' Exhibit "A", RT 10:9 to 16:19; Defendants' Exhibit "B", Exhs. Nos. 2, 3, 4 and 5)

(2) An individual under the influence of alcohol is more likely to be sexually stimulated by viewing sexual acts, conduct and displays, and is more likely to engage in sexual activity on premises affording such stimulation than on premises which do not. (Defendants' Exhibit "A", RT 406:18 to 407:17)

(3) The presenting of topless-bottomless, nude entertainment, sexual acts and/or visual displays (film or slides) showing sexual acts, on on-sale alcoholic beverages premises has resulted in the following factors adverse to the public welfare and morals:

(a) Overt, improper, unlawful physical acts and conduct by the entertainers and by, or with, the customers. Examples:

—oral copulation of girls by customers, RT 38:19 to 40:1; 41:12 to 41:18; 63:9012; 76:34; 97:1-20; Exhibit #6;

—masturbation by customer, RT 40:26 to 41:6; 64:20-21; 72:1-18; 109:22 to 111:22; 154:8-18;

—inserting money from customers into her vagina or rubbing money on vaginal area, RT 43:23 to 43:1; 151:25 to 153:11;

—placing cream on pubic area and customer removing same with mouth, RT 59:7 to 62:5;

—customers touching girl's genitalia, RT 63:9-12; 97:1-20;

—customers with rolled up currency in mouths placing same in girl's vagina, RT 63:15-20;

—customers using flashlights rented by licensees to better observe girls' genitalia, RT 63:12-15; 136:24 to 137:3;

—customers caressing girls' breasts, RT 63:20-21; 76:19-22;

—customers placing dollar bills on bar and girls attempting to squat down and pick up same with their vulvas, RT 75:17-23; 99:3-7;

—girls urinating in beer glass and giving glass back to customer, RT 75:23-25;

—girls sitting on bars and placing their legs around customers' heads; RT 76:2-3; Exhibit #6;

—girls placing their breasts in customers' beer, RT 76:19-22;

—customers grabbing, kissing and fingering girls, RT 77:19-25;

—girls taking customers' eye glasses and rubbing on their breasts and genital areas, RT 151:25 to 153:11;

—on sale premises serving hot dogs, girls ask customer: "with or without?", if customer says "with", girl rubs hot dog in her vaginal area before serving same to customer, RT 98:24 to 99:3;

—customers dropping and placing money inside girls' panties, customers unzipping girls' clothes, girls rubbing customers faces in their breasts, girls placing their exposed vaginal area close to customers' faces, girls simulating masturbation with finger, customers kissing girls' nipples, customers' faces in girls' crotch areas, customers' mouth on girls' panties, RT 129:21 to 135:2; Exhibits 10, 11 and 13;

—girls placing own nipples in their mouth, combing their pubic area with customers' comb and asking customer to kiss comb, girls leaving stage and sitting on customers' laps with customers touching and sucking on breasts, RT 129:21 to 135:2;

—use of cucumber, dildoes, bananas, candles and other phallic symbols to simulate intercourse and other sexual activities, RT 159:13 to 160:2; 193:23 to 194:17;

—pouring beer between breasts and collecting same in beer glass held below the pubic area, RT 296:2-6;

and as to other acts and conduct see RT 33:4-11; 15-19; 62:6-12; 76:24 to 77:13; 89:1-14; 95:2 to 96:19; 139:10-20; 141:21; 155:11-19; 156:3-8; 173:16 to 174:2; 295:30 to 196:1; 302:21-24; 304:12-14.

(b) "B-girl" activity, soliciting of drinks. RT 79:9-13; 79:20 to 80:7; 82:1-10; 83:18 to 84:7; 85:15 to 86:1; 88:18-24; 151:25 to 153:11; 337:20-26; 345:21 to 346:7; 363:5-14; 540-541. Where in 1964, San Francisco was almost free of "B-girl" activity, topless-bottomless bars has result in "B-girl" activity reaching epidemic proportions, RT 79:9 to 80:7.

(c) Prostitution in and around such premises, including solicitation on the premises involving some of the dancers, and acts of prostitution in dressing rooms, RT 45:26 to 46:3; 53:13-17; 79:9-17; 82:1-10; 85:15 to 86:1; 115:16-26; 121:1-11; 125:21 to 126:17; 153:12 to 154:8; 154:19-23; 161:10-19; 173:16 to 174:2; 194:24 to 195:3.

(d) Sale, possession and use of narcotics and dangerous drugs in and around such premises; RT 54:7-10; 79:9-13; 84:8 to 84:9; 126:6-17; 161:10-19; 348:5-16.

(e) Other violent crimes in and around premises including shootings, robberies, assaults, kidnappings and murders, RT 79:9-13; 80:8-13; 87:22 to 88:13; 194:24 to 195:3; 355 to 356.

(f) Exploitation of customers, including charging $3 for a drink, soliciting the money for operation of coin-fed film projectors, soliciting money for jukebox, renting flashlights so customers can better observe girls' vaginal areas, etc.,

RT 80:20-24; 129:12-20; 138:12 to 139:9; 363:5-14; 63:12-15; 136:24 to 137:3.

(g) Overt sex crimes resulting from drinking and viewing such entertainment on on-sale premises, including indecent exposure to young girls, attempted rape, and rapes, RT 23:17 to 24:10; 111:23 to 113:8; 115:14-15; 125:21 to 126:5; 135:7 to 136:15; 151:6-19; 199:4-20; 267:16-25.

(h) Drunkenness and intemperance on such premises, RT 194:24 to 195:3; 300-9 to 301:4; 345:21-346:17.

(i) Minors on premises, RT 182.

(j) Serious and extensive law enforcement problems. On-sale premises offering such nude entertainment and/or films displaying sexual acts have very serious and extensive attendant and resulting police problems due to the crimes being committed on and around such premises. Availability of alcoholic beverages for consumption and the proximity of the girls to the customers in on-sale premises results in police problems not prevalent in non-licensed theaters offering such entertainment. The seriousness of the police problem increases and progresses as the entertainment offered progresses from topless to bottomless to the actual sex acts, live or on film. RT 22:22 to 23:14; 28:4-5; 33:4-11; 44:13-20; 44:24 to 45:7; 52:16 to 53:12; 54:10-15; 81:3-8; 85:11-20; 86:18-23; 87:5-14; 99:17-25; 108:14 to 109:10; 115:14-26; 120:11-21; 125:21 to 126:5; 149:8-18; 163:11 to 166:1; 166:21 to 168:26; 170:6-9; 169:6-11; 171:24 to 172:19; 186:18-26; 187:12 to 188:5; 194:18; 196:1-12; 265:8 to 266:15; 268:7-14; 269:9-17; 296:11-14; 297:22-26; 330:24-26; 342:16-26; 343:1-6; 347:2-5; 348:17; Exhs. Nos. 15, 16 and 17.

(k) Assaults on police officers at such premises, RT 113:9 to 115:10; 189:22 to 191:5; 299:21-24; 347:22-26.

(l) et cetera.

In addition, an examination of the hearing record and exhibits will demonstrate the extensive number of alcoholic beverage control violations and the conditions contrary to public welfare and morals which occur on premises offering such non-verbal acts and conduct. See specifically RT 534 to 616; 642 to 703; Exhibits 43 to 67. The films being shown on licensed premises, and included in the exhibits, show everything from actual sexual intercourse and oral copulation between persons, to intercourse between a girl and a dog, to a man defecating on a nude girl and rubbing his bowel movement all over her breasts and body.